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U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 42

STATE OF UTAH, PETITIONER,
AND INDEPENDENT COAL & COKE CO.,
vs.
THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 6, 1931

CERTIORARI GRANTED MAY 18, 1931

(35,771)

(35,771)

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF UTAH

Equity. No. 8224

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

CARBON COUNTY LAND COMPANY, a Corporation, and INDEPENDENT COAL & COKE COMPANY, a Corporation, Defendants; State of Utah, Intervener

PLAINTIFF'S AMENDED BILL OF COMPLAINT—Filed Dec. 9, 1927

To the Judge of the United States District Court for the District of Utah:

Comes now the United States by its undersigned solicitors acting herein under authority and direction of the Attorney General, leave of Court being had and obtained therefor, and by this its amended bill of complaint against the Carbon County Land Company, a corporation and Independent Coal & Coke Company, a corporation, for cause of action alleges:

1. That the defendant company, Carbon County Land Company is a corporation organized under the laws of the State of Utah, with its office and principal place of business in Salt Lake City, in said State; that the defendant company, Independent Coal & Coke Company, is a corporation organized under the laws of the State of Wyoming and duly authorized to do business in the State of Utah, [fol. 2] through compliance with the laws of the State of Utah relative to foreign corporations, with its office and principal place of business in Salt Lake City, State of Utah.

2. That during the years 1901 to 1904 there were certified to the State of Utah under certain grants made to the State by the Act of July 16, 1924 (28 Stat. 107), the following described lands, to wit:

The Northwest quarter and Southeast quarter of Section 22;

The East half of Section 27;

The South half of Section 33;

All of Section 34;

The South half of Section 35;

The North half of Section 26;

The North half of Section 33; all in Township 12 South, Range 11 East;

All of Sections 1 and 3;

The North half of Section 10;

The North half of Section 11;

The North half of Section 12;

The Southeast quarter of Section 12;

The East half of the Northeast quarter of Section fourteen (14), in Township 13 South, Range 10 East; and

Lots 1, 2 and 3, and the Southeast of the Southeast in Section 3;

Lot 1, Northeast quarter of Northwest quarter;

Northeast quarter, North half of Southeast quarter, Southeast quarter of Southeast quarter of Section 7, Township 13 South, Range 11 East, all of Salt Lake Base Meridian.

3. That the State of Utah executed contracts of sale to said lands to Stanley B. Milner, Truth A. Milner, Harley O. Milner, and Samuel H. Gibson, and that thereafter on January 7, 1907, a suit was instituted in this court by the United States of America against the aforesaid parties and the defendant herein, the Carbon County Land Company, to which the said contracts of sale have been assigned, to quiet the title of the United States to said lands upon the ground that [fol. 3] the said lands were mineral lands, were known to be such at the time of their selection by the State of Utah, and of fraudulent procurement of the contracts of sale from the State by the defendants, the Milners and Samuel H. Gibson, through false representations made by the said defendants to the officers of the State that said lands were non-mineral in character. Said suit was tried on the merits, testimony was taken, and this court entered its decree therein on June 8, 1914, as follows:

"In the District Court of the United States in and for the District of Utah, Central Division

In Equity

Old No. 901. New No. 281

United States of America, Plaintiff,

vs.

Truth A. Milner, Administratrix of the Estate of Stanley B. Miller, Deceased; Truth A. Milner, Harley O. Milner, Carbon County Land Company, a Corporation, and Peter N. Campbell, defendants.

Decree

This cause came on further to be heard at this term, and having been argued by counsel, upon consideration thereof,

It is Ordered, Adjudged and Decreed as follows, to-wit,

That the plaintiff is the owner and entitled to the possession of the following described property, to-wit:

The Northwest quarter (¼), the southwest quarter (¼) of section twenty-two (22); the east half (½) of section twenty-seven (27); the South half of Section thirty-three (33); all of Section thirty-four (34); the South half (½) of Section thirty-five (35), in Township twelve (12) South, Range eleven (11) East, Salt Lake Meridian, containing 1920 acres.

The North half (½) of Section twenty-six (26), township twelve (12) south, Range eleven (11) East, Salt Lake Meridian, containing 320 acres.

The North half (½) of Section thirty-three (33), Township twelve (12) South, Range eleven (11) east, Salt Lake Meridian; lots one (1), two (2); three (3), and the Southeast quarter (¼) of the Southeast quarter (¼) of Section three (3), township thirteen (13) south, Range (11) eleven east, Salt Lake Meridian, containing 477.04 acres.

All of sections one (1) and three (3); the North half (½) of Section ten (10); the North half (½) of section eleven (11); the North half of section twelve (12), Township thir-

[fol. 4] teen (13) south, range ten (10) east, Salt Lake Meridian, containing 2244.24 acres.

The Southeast quarter (¼) of Section twelve (12); the east half (½) of the Northeast quarter (¼) of Section fourteen (14), Township thirteen (13) South, Range ten (10) east; Lot one (1); the Northeast quarter (¼); the Northeast quarter (¼) of the northwest quarter (¼); the north half (½) of the Southeast quarter (¼); the southeast quarter (¼) of the southeast quarter (¼) of Section Seven (7), in Township thirteen (13) south, Range eleven (11) east, Salt Lake Meridian, containing 603 acres, making a total amount of five thousand, five hundred and sixty-four and twenty-eight hundredths (5564.28) acres, all situated in the County of Carbon, in the State of Utah, and that plaintiff's title thereto be quieted against any and all claims of the defendants, or either of them, or of any person or persons claiming or hereafter to claim through or under the said defendants, or any or either of them; that said defendants, and each of them have no right, title or interest, or right of possession in or to said premises hereinabove described, or to any part thereof; and that the said defendants, and each of them, are perpetually restrained and enjoined from setting up or making any claim to or upon said premises or any part thereof, and all claims of said defendants, and each of them, are hereby quieted.

That the plaintiff be and is hereby adjudged and decreed to be the true and lawful owner of the said lands, as hereinabove described, and every part and parcel thereof, and its title thereto is adjudged and decreed to be quieted against all claims, demands or pretenses whatsoever of the said defendants, and each of them.

It is Further Ordered, Adjudged and Decreed that the plaintiff have and recover its costs herein, taxed at $907.20 against the defendants.

Dated this 8th day of June A. D. 1914.

John A. Marshall, Judge.

The decision of this court was affirmed on appeal by the Circuit Court of Appeals on November 15, 1915 (228 Fed. 431), a copy of the opinion in which is attached hereto as an exhibit and is hereby made a part of this bill.

5. The plaintiff further shows that the State of Utah was not made a party to said suit and it was believed by the [fol. 5] plaintiff that the State would leave to the determi-

nation of the courts the question of right between the Government and those who had misused the agency of the State in acquiring title to the lands, and conform its subsequent action to that determination.

6. However, the State of Utah has not seen fit to so conform its subsequent action to the determination of the courts, but, on the contrary, on February 10, 1920, the State issued its patent to said lands to the Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned; in so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the beforementioned suit.

7. The Independent Coal & Coke Company, a corporation, claims to be the owner of Section 3 and the North half of Section 10, and the Northwest quarter of Section 11, in Township 13 South, Range 10 East, through and by virtue of a conveyance to it by the defendant, the Carbon County Land Company, made subsequent to the issuance by the State of its patent to said land to the Carbon County Land Company on February 10, 1920.

8. The plaintiff avers that said lands were determined to be mineral lands in the suit hereinbefore referred to and as such not subject to selection by the State, both by the decision of this court and by the Circuit Court of Appeals, and this question is therefore res judicata.

9. The plaintiff avers further that at all times the title to said lands has been equitably in the United States.

10. The plaintiff further alleges that said patent from the State of Utah to the Carbon County Land Company evidences the same right, title and interest in and to the land in question in said defendant as that asserted and pleaded by said defendant and its assignors in the prior suit hereinbefore referred to and against which the title of the United States was quieted by the decree of this court heretofore pleaded and set out herein.

Wherefore, and now that the State of Utah has issued its patent to said lands to the said defendant, the Carbon County Land Company, and the Carbon County Land Company has executed its deed purporting to convey part of

said lands to the defendant, the Independent Coal & Coke Company, as hereinbefore alleged, the plaintiff prays that the defendants be adjudged and decreed to hold whatever title they may have to the said lands derived through said [fol. 6] patent from the State of Utah in trust for the plaintiff; that such title so derived by and through said patent be adjudged and decreed to inure to the plaintiff and to vest in plaintiff and that the defendants convey the same to plaintiff so that plaintiff may have the benefits of the decree heretofore rendered by this Court and herein set out; that the defendants be restrained and enjoined from hereinafter setting up any claim or title to said lands or any part thereof or in any manner trespassing thereon or removing any coal or other product therefrom, and that defendants be required to make direct and perfect answer to all and singular the allegations in this amended bill of complaint, but not under oath, answer under oath being hereby specifically waived, and that the plaintiff have all other special and general relief to which it is entitled under the circumstances and facts of this case as in equity and good consciousness may seem just and proper.

Charles M. Morris, United States Attorney. Nat M. Lacy, Special Assistant to the Attorney General.

Duly sworn to by Nat M. Lacy. Jurat omitted in printing.

[fol. 7] EXHIBIT TO AMENDED BILL OF COMPLAINT

(CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, November 15, 1915)

No. 4454

MILNER et al.

v.

UNITED STATES

1. Public Lands 52—Grants—Exception of Coal Lands.—Whether public lands are to be classed as coal lands, and are excepted from a grant as such, does not depend on whether coal in paying quantity and of commercial quality is

actually disclosed in the land, but may be determined by other circumstances, such as their location with reference to other known and proved coal land.

(Ed. Note.—For other cases, see Public Lands, Cent. Dig. pars. 139-142, 146, 147; Dec. Dig. 52.)

2. Public Lands—106—Certification of Land Under Grant—Conclusiveness of Finding.—The certification of land by the Land Department under a grant which excludes from its operation mineral and coal lands is not conclusive upon the United States as to the character of the land, where the Department acted upon ex parte statements or proofs which were false and fraudulent.

(Ed. Note.—For other cases, see Public Lands, Cent. Dig. pars. 104-301, 302; Dec. Dig.—106.)

3. Public Lands—52.—Construction of Grant—Exception of Mineral and Coal Lands.—The grant of lands in the State of Utah by Enabling Act July 16, 1894, c. 138, pars. 8, 12, 28, Stat. 109, 110, to be selected and used for the building and maintenance of a university, an agricultural college, etc., is qualified by the provision of Rev. St. 2318 (Comp. St. 1913, par. 4613), that "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law," and does not apply to mineral or coal lands.

(Ed. Note.—For other cases, see Public Lands, Cent. Dig. pars. 139-142, 146, 147; Dec. Dig.—52.)

4. Public Lands—120—Selections under Grant—Cancellation for Fraud.—Statements made in applications to a state for the purchaes of lands to be selected by the state [fol. 8] under a congressional grant, with respect to the character of the lands, and pursuant to which such lands were selected and certified to the state, held false and fraudulent, and to entitle the United States to a decree quieting its title to the lands.

(Ed. Note.—For other cases, see Public Lands, Cent. Dig. pp. 332-335; Dec. Dig.—120.)

Appeal from the District Court of the United States for the District of Utah, J. A. Marshall, Judge

Suit in equity by the United States against Truth A. Milner, executrix of the will of Stanley B. Milner, deceased,

and others. Decree for the United States, and defendants appeal. Affirmed.

H. C. Edwards, of Salt Lake City, Utah, for appellants.
William W. Ray, U. S. Atty., of Salt Lake City, Utah (David S. Cook, Asst. U. S. Atty., of Salt Lake City, Utah, on the brief) for the United States.

Before Carland, Circuit Judge, and Amidon and Van Valkenburgh, District Judges

CARLAND, Circuit Judge:

This is an action by appellee to quiet the title to 5,564.28 acres of land situated in the county of Carbon, State of Utah. It is claimed by appellee that whatever apparent interest appellants have in the land was obtained by fraud, with the exception of Peter N. Campbell, who claims to have a lien by mortgage. Appellee was granted the relief prayed for in the court below, and appellants appeal.

Before proceeding to discuss the questions involved on this appeal, it is proper to state that by sections 8 and 12 of the act of Congress approved July 16, 1894 (28 Stat. 109), there was granted to the state of Utah in the form of what is generally known as a "floating grant," many thousands of acres of land for the purpose of erecting an agricultural college, a school of mines, and a deaf and dumb asylum. Such lands were to be selected by the state from the unappropriated public lands of the United States in such manner as the Legislature thereof should provide, with the approval of the Secretary of the Interior. In 1896 the Legislature of Utah created a board of land commissioners and gave to it the control and management of the lands so granted. Laws Utah 1896, c. 80. The board was also empowered to select and register such lands, and after this was done it was its duty to take such action as was necessary to secure the approval of the Secretary of the Interior and a final transfer of said selected lands to the state.

[fol. 9] Between December 10, 1900, and September 14, 1903, the appellants Stanley B. Milner, Truth A. Milner, Harley O. Milner, and Samuel H. Gilson made application to said board of land commissioners to purchase the land involved in this action. The application to purchase by Truth A. Milner, who was the wife of Stanley B. Milner,

was made by said Stanley B. Milner as the agent of his wife. The application to purchase made by Harley O. Milner was made by Stanley B. Milner as agent. The following is the form of the aplication to purchase made in each instance by the appellants;

"Agreement to Purchase Selected Lands

"County of Salt Lake,
State of Utah, ss:

"Personally appeared before me, a notary public in and for Salt Lake county, Utah, Truth A. Milner, by S. B. Milner, Agt., of Salt Lake City, Utah, well known to me, who, being first duly sworn according to law, deposes and says that he hereby makes application to the state board of land commissioners for the selection by the state of the following described grazing lands (name the class):

No. Acres, 320.
N½ Sec. 26, Tp. 12 S., R. 11 E., S. L. M.,

in satisfaction of any grant to the State.

"That he is a native-born citizen of the United States, over the age of 21 years, and that he has not purchased from the state of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the state of Utah and a patent therefor has been issued to the state by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one dollar and 50 cents per acre on ten years' time, in accordance with the provisions of the law governing land sales.

"2. The sum of 80 dollars and — cents, being 25 cents per acre for the land embraced in the application, is herewith deposited with the state board of land commissioners to be applied as first payment on such land after the same shall have been patented to the state.

[fol. 10] "3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the state shall be determined to have a superior right

or claim to said land, then, in either of said events, the state of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the state a bond conditioned that he will pay the full contract price for said land according to the terms of sale.

"5. That the state of Utah, by its proper officers, will agree to select said land in satisfaction of any of the government grants to the state in accordance with the laws of Utah, and, when so selected and patented to the state, will sell to affiant the same at private sale, for $1.50 per acre.

"Truth A. Milner, by S. B. Milner, Agent.

"Subscribed and sworn to before me this 17th day of April, 1901. Ellridge L. Thomas, Notary Public." (Seal.)

"Salt Lake City, Utah, Apr. 22, 1901.

"The State of Utah hereby agrees to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of State Board of Land Commissioners.

"Byron Groo, Secretary."

Each one of these applications was accompanied by an affidavit of each applicant, or his or her agent, of the tenor and effect following:

"April 18, 1901.

"STATE OF UTAH,

County of Salt Lake, ss:

"S. B. Milner, Agent, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the state of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the

limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, [fol. 11] or other valuable mineral deposit; that no portion of said land is claimed for mining purposes, under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land; and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

"S. B. Milner, Agent.

"Subscribed and sworn to before me this 18th day of April, 1901. Ellridge L. Thomas, Notary Public." (Seal.)

The board of land commissioners appointed Heber M. Wells and Byron Groo, who were respectively the president and secretary of said board, as selecting agents for the state. When a list of lands had been selected, these selecting agents filed it in the United States local land office at Salt Lake City, Utah. Said list was accompanied by the joint affidavit of said Heber M. Wells and Byron Groo of the tenor and effect following:

"State of Utah,
County of Salt Lake, ss:

"We, Heber M. Wells and Byron Groo, authorized agents of the state board of land commissioners of the state of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the state of Utah, under section 12 of an act of congress entitled, 'An act to enable the people of Utah to form a Constitution and state government, and to be admitted into the Union on an equal footing with the original states,' approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted, mineral, nor reserved lands, and are of the character contemplated by the grant in said act; that we have caused the land mentioned to be carefully

examined by agents and employees of the state as to their mineral or agricultural character; that there is not, to our knowledge, within the limits theref, any vien or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs, or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is [fol. 12] essentially nonmineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof; that the said selections and those pending, together with those approved, do not exceed the total amount granted to the state for the purpose named; that the land contains no salt spring or deposits of salt in any form sufficient to render it valuable therefor.

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

"Subscribed and sworn to before me this 15th day of September, 1903. Ellridge L. Thomas, Notary Public."

After the list of selected lands was filed in the local United States Land office, the register and receiver of said land office made a certificate as follows:

"United States Land Office Salt Lake City, Utah
September 15th, 1903.

"We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the state of Utah, under the grant to it by the act of Congress, entitled 'An act to enable the people of Utah to form a Constitution and state government, and to be admitted into the Union on an equal footing with the original states,' approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify that the

filing of said list has been allowed and approved, and that the whole of said lands are surveyed lands of the United States, and that the same are not, nor in any part thereof, returned and denominated as mineral lands, or lands, nor claimed as swamp land; neither are there any homesteads, pre-emptions, nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us, and that the said state of Utah has paid to the undersigned, the receiver, the full sum of twenty dollars in full payment and discharge of said fees.

"Frank D. Hobbs, Register U. S. Land Office, Salt Lake City, Utah. Geo. A. Smith, Receiver U. S. Land Office, Salt Lake City, Utah."

[fol. 13] The list of selected lands was then forwarded to the Commisisoner of the General Land Office, accompanied by the following statement:

"State Board of Land Commissioners, Salt Lake City, Utah

September 15th, 1903.

"I, Byron Groo, secretary of the state board of land commissioners of the state of Utah, hereby certify that Heber M. Wells and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the state of Utah.

"Byron Groo, Secretary State Board of Land Commissioners."

List No. 52. Deaf and Dumb Asylum

"List of Lands Selected by State of Utah

"The undersigned, the duly authorized agents of the state board of land commissioners of the state of Utah, under and by virtue of the act of Congress entitled 'An act to enable the people of Utah to form a Constitution and state government and to be admitted into the Union on equal footing with the original states,' approved July 16, 1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections

of the surveyed, unappropriated, unreserved, nonmineral public lands of the United States lying within the state of Utah, said lands being selected and to be applied under section 12 of said act of Congress 'for the establishment and maintenance of a deaf and dumb asylum.'

"Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

"Approved by Commissioner General Land Office December 1, 1904.

The application to purchase made by Stanley B. Milner was approved by the board of land commissioners on December 17, 1900, by the local land office on December 18, 1900, and the land certified to the state of Utah by the General Land Office June 22, 1901.

There were two applications by Truth A. Milner, by Stanley B. Milner her agent. One was made April 19, 1901, approved by the board of land commissioners April 22, 1901, approved by the local land office April 29, 1901, and the land certified to the state of Utah by the General Land Office December 23, 1901. The other was approved by the [fol. 14] board of land commissioners April 2, 1902, by the local land office April 7, 1902, and the land certified to the state by the General Land Office July 9, 1902.

The application to purchase by Harley O. Milner, by his agent Stanley B. Milner, was approved by the board of land commissioners March 24, 1903 by the local land office March 30, 1903, and the land certified to the state of Utah by the General Land Office May 9, 1904.

The application to purchase by Samuel H. Gilson was approved by the board of land commissioners December 15, 1903, by the local land office September 2, 1903, and the land certified to the state of Utah by the General Land Office December 1, 1904. The price agreed to be paid for the land was $1.50 per acre, payable in ten annnal installments. No patents from the state of Utah have been issued to the defendants for the lands in controversy, but the payments as required by the contracts of purchase have been made as therein provided.

The application to purchase and the affidavit accompanying the same, together with the representations of the selecting agents and the resulting certificate of the local land officers, was the evidence upon which the Commis-

sioner of the General Land Office acted in approving the selections. It is claimed by the United States that the certification of the lands by the General Land Office to the state was obtained by fraud, in this; that the applicants to purchase and the selecting agents appointed by the board of land commissioners, together with the certificate of the local land officers, all showed the land to be nonmineral, and that there was no deposit of coal within the limits thereof.

The affidavit accompanying the application to purchase in each instance stated that the person making the affidavit was well acquainted with the character of the land, and with each and every legal subdivision thereof, having frequently passed over the same, that his personal knowledge of said land was such as to enable him to testify understandingly with regard thereto, and that there was not to applicant's knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar lead, tin, or copper, or any deposit of coal.

Appellee claims that the lands for which applications to purchase were made were coal lands, and known to be such by the several applicants. The trial court found this to be true, and that the applications to purchase, and the action [fol. 15] of the land officials based thereon, should be canceled, and the title to the lands quieted in the United States. Appellants seek to avoid the overthrow to this claim on the part of appellee on the following grounds:

1. That there was no fraudulent intention on the part of appellants in applying to purchase the lands.

2. That the lands were not and are not coal lands, because coal is not exposed in commercially available quantities upon each legal subdivision of 40 acres.

3. That the selection of the lands in question having been made in good faith by the state of Utah under the grant of the act enabling Utah to be admitted as a state, it is immaterial whether or not the defendants falsely and fraudulently deceived and misled the selecting officers of the state of Utah as to the character of the lands.

4. That the Secretary of the Interior having certified the lands to the state of Utah under its grant, such certification is conclusive as to the fact that the lands were of such character as to permit them to be selected under the grant.

(I) Applying the rule laid down by this court in United States v. Diamond Coal & Coke Company, 191 Fed. 786, 112 C. C. A. 272, and in the same case, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936, we are of the opinion after a careful consideration of the evidence that the lands in controversy were at the time of their certification by the Secretary of the Interior to the state of Utah and at the several dates of purchase known coal lands. The same contention is made in this case as was made in the case cited, namely, that lands cannot be regarded as coal lands unless coal in quantity and quality to render its extraction profitable is actually disclosed within their boundaries. In answer to such a contention Justice Van Devanter in the case cited used the following language:

"There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate."

The evidence shows beyond question that the lands involved in this action lie along and adjacent to what is commonly known as the "Book Cliffs," or the "Book Cliffs Coal Fields," a sedimentary formation designated as [fol. 16] cretaceous, extending from Castle Gate, Utah, eastward to and beyond the Colorado-Utah line. The cliffs themselves form the edge of a plateau, and the coal outcropping in the cliffs extend back from the escarpment beneath the plateau lands. Throughout these deposits the coal occurs interstratified with the sedimentary rocks. Three experts examined these lands for the government and testified at the trial as to their character, and all expressed the same opinion as to the character of the lands. These lands lie immediately north of and above a pronounced coal formation upon which at the date of the purchase of the lands in question four well-known coal mines were being worked upon veins of coal varying in thickness from 7 to 22½ feet; said veins dipping directly into the lands in question. It appears that at no place within the lands involved in this action does the cover above the coal

exceed 2,500 feet, and the evidence is uncontroverted that coal at such depth, and of such quality and quantity as carried by the veins dipping beneath these lands, can be profitably extracted, even though it be necessary that they be mined through shafts or inclines.

As to the fraudulent intent of appellants, they must be held to have intended the natural and probable result of their acts, Gilson and Milner were both men of mature years and had great experience in the business of mining. Gilson testified that some time in 1900 he and Stanley B. Milner entered into an agreement to acquire title to certain lands in Carbon County, Utah, and they were well acquainted with the character of the lands in question, and determined they were not coal lands because there was not disclosed upon their surface coal in quantity and quality to render its extraction profitable. The affidavit accompanying each application to purchase, as we have before stated, was to the effect that the applicant was well acquainted with the character of said lands and of every legal subdivision thereof, having frequently passed over the same, and from applicant's personal knowledge was able to state that there was no deposit of coal thereon.

(2) We are satisfied that appellants knew the character of the lands in question, and, having made false statements in regard to the same, must be held to have intended to defraud. Counsel for appellants cite the case of Edmund Burke v. Southern Pacific Railroad Company, 234 U. S. 669, 34 Sup. Ct. 907, 58 L. Ed. 1527, in support of their contention that the approval by the Secretary of the Interior of the selection list containing the lands in question is final and conclusive that the lands were of the charater to be certified to the state of Utah under the grant of 1894. No [fol. 17] support for any such contention can be found in that case as applied to the facts in the case at bar.

Justice Van Devanter in the Burke Case is careful to point out that the rule there announced as to the finality of the action of the Secretary of the Interior does not apply in cases where the officers of the United States have acted upon ex parte fraudulent and false statements. At 234 U. S. 689, 34 Sup. Ct. 915, 58 L. Ed. 1527, in the opinion it is said:

"Of course, if the railroad company knows at the time of receiving a patent that the lands covered by it are mineral, a case of fraud is presented which entitled the Secretary of the Interior to have the patent canceled, as was done in Morton v. Nebraska, 21 Wall. 660 (22 L. Ed. 639), and in Western Pacific Railroad Company v. United States, 107 U. S. 526, 108 U. S. 510, 2 Sup. Ct. 802, 862, 27 L. Ed. 621, 806. But, barring cases of fraud, the issuing of a patent by the Secretary of the Interior to the railroad company gives it an absolute title, not liable to be defeated by the subsequent discovery of minerals."

Again (234 U. S. 692, 34 Sup. Ct. 916, 58 L. Ed. 1527) it is said:

"Of course, if the land officers are induced by false proofs to issue a patent for mineral lands under a non-mineral land law, or if they issue such a patent fraudulently or through a mere inadvertence, a bill in equity, on the part of the government, will lie to annul the patent and regain the title, or a mineral claimant who then had acquired such rights in the land as to entitle him to protection may maintain a bill to have the patentee declared a trustee for him; but such a patent is merely voidable, not void, and cannot be successfully attacked by strangers, who had no interest in the land at the time the patent was issued and were not prejudiced by it. Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 313 (8 Sup. Ct. 131, 31 L. Ed. 182); Diamond Coal Co. v. United States, 223 U. S. 236, 239 (34 Sup. Ct. 507, 58 L. Ed. 936); Germania Iron Co. v. United States, 165 U. S. 379 (17 Sup. Ct. 337, 41 L. Ed. 754); Duluth & Iron Range Railroad Co. v. Roy, 173 U. S. 587, 590 (19 Sup. Ct. 549, 43 L. Ed. 820); Hoofnagle v. Anderson, 7 Wheat 212, 214, 215 (L. Ed. 437)."

In the case of Washington Securities Company v. United States, 234 U. S. 76, 34 Sup. Ct. 725, 58 L. Ed. 1220, Justice Van Devanter again said:

"It is contended also that the proceedings resulting in the patents were not ex parte, but adversary; that the land [fol. 18] officers found the lands to be agricultural in character, and that this finding was conclusive upon the government. No doubt those officers found from the proofs

submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents; but the proceedings were not adversary in any true sense of the term. The applications and proofs of the enterymen were strictly ex parte. The Government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the government save in the sense that the land officers did so. As this court has often held, the findings of the land officers in such a proceeding, although not open to collateral attack, are not conclusive against the government when it sues to cancel the resulting patent upon the ground that it was obtained by means of false and fraudulent proofs. United States v. Minor, 114 U. S. 233 (5 Sup. Ct. 836, 39 L. Ed. 110); McCaskill v. United States, 216 U. S. 504, 509 (30 Sup. Ct. 386, 54 L. Ed. 590) and cases cited. In such a suit the action of the land officers is given appropriate effect by treating it as presumptively right and as requiring the government to carry the burden of proving the fraud by that class of evidence which commands respect and that amount of it which produces conviction. Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 239 (34 Sup. Ct. 507, 58 L. Ed. 936)."

(3, 4) It is not the claim of appellee that the officers or selecting agents of the state of Utah or the land officers were guilty of fraud, but that they were imposed upon by the false statements of the appellants and relied upon the same as did the officers of the local land office at Salt Lake City. The applicants to purchase the land in question, the selecting agents of the state, and the land officers of the United States all acted on the theory that mineral lands or lands containing a deposit of coal did not pass under the grant. It is not claimed that such lands passed, in the briefs of counsel, and the pleadings practically admit the allegation of the bill that the lands granted were to be non-mineral. We are of the opinion, however, that no such contention could be sustained under the facts in this case. Section 2318, R. S. U. S. (Comp. Stat. 1913, par. 4613), provides:

"In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

We held in Frederick A. Sweet, Administrator, v. United States, 228 Fed. 421, — C. C. A. —, that under Section 6 of the act of July 16, 1894 (28 Stat. 109, which specifically granted sections 2, 16, 32, and 36 in every township of the [fol. 19] proposed state of Utah, mineral lands passed to the state of Utah. We think, however, the case at bar is clearly distinguishable from that case. Section 6 granted specific lands without qualification or exception, and we were of the opinion that to hold that mineral lands were excepted therefrom would be to interpolate into the section by interpretation language that Congress did not choose to use. In the present case, however, the lands are not specified in the statute, but so many thousand acres are granted to the proposed state, to be selected as stated in this opinion, and we conclude that the certification of these lands by the Secretary of the Interior did not carry mineral lands in direct opposition to Section 2318, and the general policy of the United States. It was decided in Mullan v. United States, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170, that section 2318, above mentioned, included coal lands. Congress did not know when sections 8 and 12, supra, were enacted, what lands the state would select, and, therefore, could not have had any particular lands in view. When the Secretary of the Interior came to approve the selections made by the state, he was prohibited by section 2318 from approving the selection of mineral or coal lands. It appears from the record that all the agreements to purchase involved in this action were assigned to the Carbon County Land Company, of the stock of which Stanley B. Milner is the owner of 99,950 shares of a total of 100,000 shares capital stock. We find that the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain ownership of these lands from the United States.

Decree affirmed.

[File endorsement omitted.]

In United States District Court

Answer of Independent Coal & Coke Company to Amended Bill of Complaint—Filed Oct. 18, 1928

And now comes the Independent Coal & Coke Company, and answering the Amended Bill of Complaint of the plaintiff, admits, denies and alleges as follows, to-wit:

1. It admits that the Carbon County Land Company is a corporation organized under the laws of the State of Utah, and that said corporation has its principal office and place of business in Salt Lake City, Utah; and it further [fol. 20] admits that it is a corporation organized and existing under the laws of the State of Wyoming and duly authorized to do business in the State of Utah, and that it has its offices and principal place of business in Salt Lake City, Utah; and it further admits paragraphs 2, 3 and 4 of said Amended Bill of Complaint.

2. This defendant further admits and alleges that the State of Utah was not made a party to said suit referred to in Paragraphs 3 and 4 of said Amended Bill of Complaint, but this defendant denies that it was believed by the United States that the said State of Utah would leave to the determination of the Courts the question of right between the Government and those who had misused the agency of the State in acquiring title to the lands; and denies that it was believed by the United States that the State of Utah would conform its subsequent action to that determination and this defendant further admits and affirmatively avers that the State of Utah in no wise participated in the defense of the suit referred to in Paragraphs 3 and 4 of said Amended Bill of Complaint; and further avers that whatever was determined as a matter of law or fact in said suit was and is in no wise binding upon the State of Utah; and further avers that the extent of the determination made by the decree set forth in Paragraph 3 of said Amended Bill of Complaint was merely to annul the contracts entered into between the State of Utah and the defendants named in said decree.

3. It further admits and affirmatively avers that it was not the purpose of said suit to in any wise disturb or interfere with or vacate or annul the title of the State of Utah

to the lands described in said decree, but on the contrary it was merely the purpose of the United States to annul the aforesaid contracts entered into between the State of Utah and the defendants named in said decree, and to leave the title to the lands described in said decree vested in the State of Utah, free from said contracts or from any right that might arise therefrom.

4. And the said defendant further avers and admits that the State of Utah continued to hold, possess and own said lands, free from said contracts or any right that might arise therefrom, until February 10, 1920; and the said defendant further admits and avers that these lands were, as between the United States and the State of Utah, at the time of the certification by the United States to the State of Utah, and ever since have been, non-mineral in character, and have never, as between said United States of America and the said State of Utah, been known to be mineral in character, and that while the aforesaid decree [fol. 21] finds and adjudicates that said lands are mineral in character, and were known to be such at the time of said certification, still said decree does not and could not and did not adjudicate that fact as to the State of Utah, because the State of Utah was not a party to said suit and did not in any wise or at all participate in the defense thereof; and the said defendant further admits and affirmatively avers that the title in said lands continued to be vested in the State of Utah, and that the State of Utah continued to hold, own and possess said lands until that title had, by reason of lapse of time, to-wit; more than six years from the date of certification, ripened into a perfect and absolute title as against all claims that could be made or asserted by the United States as against the State of Utah.

5. And the said defendant further admits and affirmatively avers that on or about February 10, 1920, when the state of Utah was the absolute owner of said lands, free from any and all claim or claims of the United States, the State of Utah sold said lands to the Carbon County Land Company for the agreed purchase price of $100.00 per acre; and the said defendant further admits and affirmatively avers that this transaction was entirely independent of the transaction which was involved in the suit decided in 1914, and was made by the State of Utah in its capacity as the

owner of said lands and not as a trustee, either actual or constructive, of the United States of America; and the said defendant further admits and affirmatively avers that the State of Utah issued its patent or deed to said lands to the defendant, Carbon County Land Company, relying upon and believing that it was the true and lawful owner of said lands, and that the decree made and entered in 1914 in no wise interfered with or disturbed its legal or equitable title to said lands.

6. The defendant further admits that it claims to be, and avers that it is, the owner of Section 3 and the north half of Section 10 and the northwest quarter of Section 11, in Township 13 South, Range 10 East; and said defendant avers that it acquired its ownership of said land last above described through and by virtue of a full and sufficient warranty deed of conveyance made to it by the defendant, Carbon County Land Company, on or about October 16, 1920, under the circumstances more particularly in this Answer set-forth; and the said defendant further admits and affirmatively avers that as a consideration for said conveyance made to it by the said Carbon County Land Company it issued and delivered to the said Carbon County. [fol. 22] Land Company approximately 369,000 shares of its capital stock; that said capital stock had a par value of one dollar per share and a market value, at the time of said issuance and delivery, in excess of fifty cents per share; and the said defendant further admits and avers that it, as a part of said transaction and in addition to the consideration paid, to-wit; 369,000 shares, agreed to assume and did assume and agree to pay to the State of Utah the sum of $112,000 or $100.00 per acre for each and every acre of the land in this paragraph above described; and the said defendant further admits and avers that the State of Utah entered into an agreement with this defendant whereby this defendant was permitted to buy said 1120 acres of land from said Carbon County Land Company, and was permitted to assume and agree to pay said mortgage indebtedness of $112,000, and whereby the State of Utah was obligated to release said lands from the operation and effect of said mortgage upon the payment to the State of Utah by this defendant of said $112,000.

7. This defendant further avers that while it knew that the suit referred to in Paragraphs 3 and 4 of the Amended Bill of Complaint had been tried and determined between the United States and the defendants named in the said decree set forth in Paragraph 3 of said Amended Bill of Complaint, it also knew and relied upon the fact that the State of Utah was not a party to that suit, and this defendant did not believe that the State of Utah was in any wise bound by that decree or any part thereof; and this defendant further avers that it also knew that the United States of America had, on or about the eighth day of January, 1907, immediately prior to the commencement of the suit which resulted in the decree set forth in Paragraph 3 or said Amended Bill of Complaint, represented to the State of Utah that it was no part of the purpose of said suit to in any wise disturb or affect the title of the State of Utah to the lands described in said suit and in said decree; and this defendant further avers that it knew that the State of Utah had claimed ownership of these lands from the date of the certification up to and including February 10, 1920; it knew that the State of Utah had been offering said lands for sale; it knew that the United States of America had knowledge of that fact, and had made no effort to reclaim or reobtain said lands from the State of Utah; and the said defendant further avers that the 1120 acres above described, claimed by this defendant, were in part adjacent to and in part contiguous to other lands owned by the defendant herein; that the defendant was operating a large coal mine, and it knew that if the 1120 [fol. 23] acres were to remain Government land the fact of ownership by the Government would not in any wise disturb the operations of the defendant of its coal mining properties, but that if these lands were to be the subject of private ownership, and were to be sold to competitors, it would become intensely inconvenient and embarrassing to this defendant in the operation of its coal mines upon its other lands adjacent and contiguous to said 1120 acres of land.

8. The defendant denies that the lands which it claims, to-wit: 1120 acres above described, had been determined to be mineral lands as between the United States and the State of Utah, and denies that such lands were not the

subject of selection by the State, and avers that the decision of this Court, made in 1914 and affirmed by the Circuit Court of Appeals of the United States for the Eighth Circuit in 1915, in any wise or at all determined the mineral or non-mineral character of said lands as between the State of Utah and the United States.

9. And the said defendant, further answering said Amended Bill of Complaint, affirmatively avers that the State of Utah was admitted to the Federal Union on January 4, 1896; that prior to its admission to the Union the Congress of the United States enacted the Enabling Act on July 16, 1894, in order to enable the people of Utah to form a constitution and a state government and to be admitted into the Union on an equal footing with the original states; that in lieu of the grant of lands for the purpose of internal improvement made to new states by the eighth section of the Act of September 4, 1841, and in lieu of any claim or demand by the State of Utah under the Act of September 28, 1850, and Section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, certain grants of land were made to the State of Utah for the establishment of water reservoirs for irrigating purposes, for the establishment and maintenance of insane asylums, schools of mines, deaf and dumb asylums, reform schools, normal schools, institutions for the blind, miners hospitals and for educational purposes; that by the terms of said Enabling Act it was provided that the State of Utah should not be entitled to any further or other grants of land for any purpose other than that expressly provided for in said Act; and the State of Utah accepted said grants and entered into and became a part of the Federal Union by and through the terms of said Enabling Act, and thereby surrendered any and all claim it had to lands comprised within the then Territory of Utah, now the State of Utah.

[fol. 24] 10. That after the admission of the State of Utah into the Union the State organized a Board of Land Commissioners, with general supervisory power over the disposition of lands granted to it by the United States under said Enabling Act, and with authority to select particular lands by reason of the floating grants made in said Enabling Act; that from time to time the State did select

named in said suit and in said decree; but this defendant avers that it was not quieted as against the State of Utah because the State of Utah was not a party to said suit or to said decree; and the said defendant further avers that immediately upon the commencement of said suit, on or about the eighth day of January, 1907, the Attorney General of the United States of America, acting by and through the [fol. 26] then Special Assistant, the said Attorney General representing and appearing for and on behalf of the United States in bringing and prosecuting said suit, made and represented to the State of Utah and to its then State Board of Land Commissioners, that the State of Utah had purposely not been made a party to said suit; that the legal title to all of said lands was in the State of Utah, and that if the United States of America should be successful in said suit, the title to all of said lands would still remain in the State of Utah, and that the United States of America did not by said suit seek to deprive the State of Utah of said lands, or the title thereto, but sought only to relieve the State of Utah from being held on said contracts of sale made and entered into between the State of Utah and the parties defendant named in said decree and set out in Paragraph 3 of said Amended Bill of Complaint; and this defendant further avers that said representations so made by the then representative of the United States of America, appearing as solicitor for said United States in said suit commenced in January, 1907, were made before the assembled Board of Land Commissioners of the State of Utah for the purpose of keeping the State of Utah from in any wise intervening in or interfering with the prosecution of said suit by the United States against the said Milners and the said Carbon County Land Company; and the State of Utah made said representations a part of its public records and relied upon the same, and relying upon the same and believing them to be true, the said state of Utah did not in any wise intervene in or participate in said suit, but continued to assert and maintain its ownership of said lands, and continued to treat the same as if they had been conveyed by the United States to the State of Utah in partial satisfaction of the floating grants made in said Enabling Act; and said defendant avers that both the United States and the

State of Utah continued to and did rely upon said representations up until the commencement of this suit in May, 1924; and this defendant further avers that neither the State of Utah nor the United States has at any time between the date of certification of said lands and the commencement of this suit in May, 1924, ever claimed any part of these lands as lands of the United States, but that each and both of said sovereignties have considered the floating grants as satisfied and discharged to the extent of the acreage of the lands described in said Amended Bill of Complaint.

16. And the defendant further avers that the United States of America at no time since the bringing of said suit in 1907, has ever made any demand or request whatsoever on the State of Utah, or any of its officers, boards of depart-
[fol. 27] ments, or any of its agents, that it should relinquish its title to said lands or any part thereof to the United States, or that it should convey, or attempt to convey, said lands or any part thereof to said United States of America, but at all times up until the commencement of this suit in May, 1924, the United States of America permitted the State of Utah, without any question in regard thereto, to claim and have the ownership of said lands and each and every part thereof, and at all times permitted the State of Utah to believe that the representations so made to it through its State Board of Land Commissioners were true, and for these reasons this defendant denies that the United States believed at any time that the State of Utah would consider itself in any wise bound by the decree set-forth in Paragraph 3 of the Amended Bill of Complaint; but, on the contrary, this defendant asserts and avers that neither the United States nor the State of Utah ever believed that the determination of the title to the land in question, as between the United States and the State of Utah, would be left to the Courts in the suit commenced in 1907, which resulted in the decree set forth in Paragraph 3 of the amended Bill of Complaint.

17. And this defendant further avers that the State of Utah continued to own, hold and possess said lands until on or about the second day of January, 1920; that at that

time, acting in good faith, and believing the representations theretofore made by the Federal Government as aforesaid, the state entered into a new and independent contract with the Carbon County Land Company; that while the Carbon County Land Company was a successor-in-interest to Stanley B. Milner, the Carbon County Land Company itself had committed no fraud upon the Government, but had merely purchased the contracts which the decree adjudges to have been fraudulently obtained; that the contract entered into between the Carbon County Land Company and the State of Utah in January, 1920, was entirely new and independent of the contracts which the State had made with Milner between December, 1900, and December, 1904; that by the contract of January 2, 1920, the State agreed to sell and the Carbon County Land Company agreed to buy the 5564.28 acres of land at the purchase price of $100.00 per acre; that the State of Utah, believing that it owned said lands, free from any claim of the Government, conveyed the same to the Carbon County Land Company and took the Carbon County Land Company's notes for the purchase price and a mortgage securing the payment of said indebtedness for the principal amount of $556,428; and this defendant avers that the State of Utah now holds and [fol. 28] owns said notes and mortgage as a continuing obligation of the said defendant, Carbon County Land Company; and this defendant avers that it is informed and believes, and therefore charges the fact to be, that the Carbon County Land Company, in making said purchase, acted in good faith and relied upon the certifications made by the Government to the State of Utah, and relied upon the representations made by the Government to the State of Utah in January, 1907; and this defendant avers that the Carbon County Land Company believed that the State of Utah had good title to said lands and the right to dispose thereof; and this defendant avers that in reliance upon said representations so made in January, 1907, as aforesaid, the State of Utah executed and delivered to the said Carbon County Land Company its patent for said lands and all thereof.

18. And this defendant further avers that thereafter, to-wit; on or about the sixteenth day of October, 1920, it pur-

chased from said defendant, Carbon County Land Company, all of Section 3, the north half of Section 10 and the northwest quarter of Section 11, in Township 13 South, Range 10 East, and paid to the Carbon County Land Company the 369,000 shares of the capital stock, as has been hereinbefore alleged; and the said defendant further avers that at the time of said transaction it had a separate and independent agreement with the State of Utah whereby a segregation of the lands so purchased by this defendant from the Carbon County Land Company, to-wit; 1120 acres, was made from the entire tract purchased by the Carbon County Land Company, and by reason of said agreement this defendant became obligated to the State of Utah for $112,000, and the State of Utah agreed with the Carbon County Land Company and with this defendant to release the 1120 acres from the operation and effect of said mortgage when this defendant had paid to the State of Utah the sum of $112,000.

19. This defendant denies that it at any time ever in any wise misrepresented the character of said lands to any person, and denies that it at any time ever undertook to aid or abet either the State of Utah or the Carbon County Land Company, or any other person, in fradulently obtaining title to these lands; and, on the contrary, this defendant asserts that it has at all times acted in good faith, and has at all times believed that the title to the lands so purchased by it was in the State, free from any claim of the United States; and said defendant furthers avers that it purchased said lands from the Carbon County Land Company, as is herein alleged, and fully paid the consideration, to-wit: [fol. 29] 369,000 shares of its capital stock, and assumed and agreed to pay the mortgage due the State of Utah, without having any notice or knowledge, either actual or constructive, of any adverse claim or claims of any nature of the United States; and the said defendant avers that it did not know that the United States was making, or ever intended to make, any claim to the 1120 acres of land until this suit was commenced in May, 1924.

20. This defendant avers that these lands, to-wit; 1120 acres, were so situated with reference to the other property of this defendant that if said lands were to become the sub-

ject of private ownership this defendant was required for its own protection, by reason of the situation of said lands, to make all reasonable effort to obtain title thereto; and this defendant further avers that it knew said lands had been certified by the plaintiff to the State of Utah, and knew of the representations aforesaid made to the State Board of Land Commissioners of the State of Utah, and knew that the decree of 1914 set-forth in Paragraph 3 of plaintiff's Amended Bill of Complaint had never been in any wise asserted as against the State of Utah, and knew that no effort had been made by the United States to reobtain the title to said lands from the State of Utah, and knew that no demand had been made by the United States upon the State of Utah for a reconveyance of said lands. This defendant believed that the State of Utah was the true and lawful owner of said lands and, so believing, this defendant purchased said lands as aforesaid, and issued its 369,000 shares of capital stock as aforesaid, and the said defendant further avers that said capital stock has been transferred by the Carbon County Land Company to divers persons so that its issuance cannot be annulled by this defendant; that dividends at the rate of at least six per cent. per annum have been paid upon said capital stock at par, and were paid upon said capital stock prior to the commencement of this action in May, 1924.

21. And this defendant further avers that immediately after obtaining its deed from the Carbon County Land Company in October, 1920, this defendant entered into possession of said lands and has ever since occupied the same, has made valuable improvements upon certain portions of the same; and said defendant further avers that immediately upon the issuance of its patent on February 10, 1920, the State of Utah caused all of said lands to be placed upon the assessment rolls for purposes of taxation, and that taxes have been levied and assessed upon all of said property for each and every year, including the year 1920; that [fol. 30] this defendant has paid upon the 1120 acres claimed by it for the years 1920, 1921, 1922 and 1923, the sum of $40,170.69; that that amount was paid by this defendant as State, County and School taxes between the time of the

issuance of the patent by the State of Utah and prior to the commencement of this suit by the United States.

22. And the defendant further avers that the mortgages made upon this land to the State of Utah, as aforesaid, for the purchase price of said land from the State of Utah by the Carbon County Land Company were, within a short time after the execution and delivery of said mortgages, duly recorded in the Mortgage books of Carbon County, Utah; that the deeds made by the State of Utah and by the Carbon County Land Company for the 1120 acres of land involved in this Answer and claimed by this defendant were likewise duly filed for record with the County Recorder and and Register of Deeds of Carbon County, Utah; that these facts, together with the fact that this defendant had taken possession of said land, and together with the fact that the land was being assessed by the State of Utah for taxes and by the various sub-divisions of said State, were all known to the plaintiff as early as 1920; that the plaintiff likewise knew at the time of the certifications in 1901 and 1904 that these lands were claimed by the State of Utah, and that the dominion incident to ownership was exercised by the State of Utah, and yet, notwithstanding all of said facts and circumstances, the plaintiff never attempted to assert any title as against the State of Utah or its grantees, including this defendant, until May, 1924, when it commenced this suit.

23. And the said defendant further avers that from the time of Statehood down until the time when the first suit was commenced in January, 1907, this land was classified by both the Government and the State as agricultural grazing land and not as coal land; that even after the first suit was commenced in January, 1907, down until May, 1924, when this suit was commenced, no claim was ever made by the Government as against the State of Utah that said land should be classified as coal land; but, on the contrary, the Government continuously represented and claimed to the State of Utah that the title to the land should pass and had passed from the Government to said State, and that the title of the State should not be at any time re-

claimed by the Government as against the State. This defendant therefore avers that the plaintiff's cause of action, if any it ever had, accrued more than six years before the commencement of this suit in May, 1924, and that the action is barred by the provisions of Section 8 of the Act of Con-
[fol. 31] gress of March 3, 1891, which in substance provided that suits to vacate, set aside or annul patents shall be brought within six years after the issuance thereof; and this defendant therefore avers that because of the facts and circumstances, and particularly because of the representations made by the Government and because of the fact that the State of Utah and this defendant relied upon said representations and because of the fact that this defendant has been permitted to place itself in a position from which it cannot withdraw in the issuance of the aforesaid capital stock to the Carbon County Land Company and the sale and distribution of said stock by said Carbon County Land Company to divers persons; so that this defendant cannot again reobtain said stock or the value thereof and the payment of dividends thereon, and because of the fact that it has made valuable improvements upon said land involved in this Answer, and because of the fact that it has paid out over $40,000 in taxes upon said land, and because of the fact that it is unable to recover said amount so paid out, this defendant avers that the plaintiff is now equitably estopped from asserting any rights in or to the 1120 acres involved in this Answer; and the said defendant further avers that the title of the State of Utah was on February 10, 1920, at the time it issued its patent to the Carbon County Land Company, absolute, complete and invulnerable as against any attack by the United States, and that therefore the State of Utah might sell, as it did, to any person whomsoever, and that the mortgage given by this defendant, as aforesaid, to the State of Utah, for $112,000 is a valid and enforcible obligation in favor of the State, and that the United States cannot equitably reclaim said land without at least first transferring to the State other lands in lieu of the lands involved in this suit and without repaying to this defendant the sums expended by said defendant in the honest belief that it had a right to buy said lands from the State of Utah and from the Carbon County Land Com-

pany as aforesaid; and the said defendant further avers that the claim attempted to be asserted by the Government in this action is without equity and is unconscionable, and that the title of this defendant, both legal and equitable, is absolute and complete as against all claims of every person whomsoever, except the State of Utah, which holds the mortgage for $112,000 upon the 1120 acres involved in this Answer.

Wherefore, having fully answered the Amended Bill of Complaint of the plaintiff this defendant prays judgment that the Government be denied the relief prayed for in its Amended Bill of Complaint; that it take nothing by reason [fol. 32] thereof, and that this defendant have judgment quieting its title to said 1120 acres of land claimed herein by it as against all claims, legal or equitable, that can be made by the United States.

And the said defendant further prays for all general and proper relief.

M. E. Wilson & A. R. Barnes, Attorneys for Independent Coal & Coke Company.

Duly sworn to by F. W. Nixon. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER PERMITTING STATE OF UTAH TO INTERVENE.—Filed Oct. 22, 1928

The complaint in intervention of the State of Utah in the above entitled cause being presented to the Court by the Attorney General of said State, and the United States of America appearing by its solicitors of record and consenting thereto.

It is hereby ordered that the State of Utah be and it is hereby permitted to intervene in said cause as a defendant, and that the complaint in intervention be considered as an answer to the complainant's amended bill and also as a cross-bill against the United States of America and the original defendants named in said cause.

[fol. 33] It Is Further Ordered That The Plaintiff and the original defendants be required to plead to said complaint in intervention within thirty days from this date.

Done in open Court this 22nd day of October, A. D. 1929.

Tillman D. Johnson, Judge.

Consent is hereby given to the above order, and receipt of a copy of the complaint in intervention is hereby acknowledged.

Chas. M. Morris.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

COMPLAINT IN INTERVENTION OF THE STATE OF UTAH—Filed Oct. 22, 1928; refiled Nov. 26, 1928

And now comes the State of Utah, by its Attorney General appearing in its behalf, under and pursuant to the express direction and order of the Governor of said state, and by leave of Court first had and obtained, files this as its Complaint in Intervention in the above entitled cause, and for a cause of action, and as an affirmative defense to the Amended Bill of Complaint of the United States, the said State of Utah alleges:

1. That any decree rendered in this suit will affect the title of the State to the property described in Paragraph 2 of the plaintiff's Amended Bill of Complaint, and if the defendants named in this suit are deprived of said property, pursuant to the prayer of said Amended Bill of the plaintiff, then such deprivation will undoubtedly result in a claim again-- the State of Utah, and therefor the Governor of the State, pursuant to authority vested in him by the statutes of the State, has directed the Attorney General to voluntarily appear in behalf of the State and set-up its claim to the land involved in this suit.

2. That the State of Utah was admitted to the Federal Union on January 4, 1896; that prior to its admission to the Union of Congress of the United States enacted the Enabling Act on June 16, 1894, in order to enable the people of Utah to form a constitution and a State government, and to be admitted into the Union on an equal footing with the

original states, that in lieu of the grant of lands for the [fol. 34] purposes of internal improvement made to new states by the eighth section of the Act of September 4, 1841, and in lieu of any claim or demand by the State of Utah under the Act of September 28, 1850, and Section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, certain grants of land were made to the said State of Utah for the establishment of water reservoirs for irrigating purposes, for the establishment and maintenance of insane asylums, schools of mines, deaf and dumb asylums, reform schools, normal schools, institutions for the blind, miners hospitals and for educational purposes; that by the terms of said Enabling Act it was provided that the State of Utah should not be entitled to any further or any grants of land for any purpose other than that expressly provided for in said Act; and the State of Utah accepted said grants and entered into and became a part of the Federal Union by and through the terms of said Enabling Act, and thereby surrendered any and all claims it had to lands comprised within the then Territory of Utah—now the State of Utah.

3. That after the admission of the State of Utah into the Union said State organized a Board of Land Commissioners, with general supervisory power over the disposition of lands granted to it by the United States under said Enabling Act, and with authority to select particular lands by reason of the aforesaid floating grants made in said Enabling Act; that from time to time the State did select certain lands; that when any selection was made by the State from out of the lands covered by said grants contained in said Enabling Act, then that amount of land so selected by the State was charged by the Federal Government as against the State of Utah, and the grant theretofore made to the State was thereby reduced to the extent of the acreage of the lands so selected by the State.

4. That between December 10, 1900, and December, 1904, the State selected the lands described in the decree set-forth in Paragraph 3 of the plaintiff's Amended Bill of Complaint, consisting of 5564.28 acres; that the State at that time believed, and ever since has believed, that said land so selected by it was agricultural in character and that it did not contain any known mineral, and believed that the land was not

certain lands; that when any selection was made by the State from out of the lands covered by said grants contained in said Enabling Act, then that amount of land so selected by the State was charged by the Federal Government as against the State of Utah, and the grant therefore made to the State was thereby reduced to the extent of the acreage of the lands so selected by the state.

11. That between December 10, 1900, and December, 1904, the State selected the lands described in the decree set-forth in Paragraph 3 of the plaintiff's Amended Bill of Complaint, consisting of 5564.28 acres, which included the 1120 acres claimed in this Answer by this defendant; that the State at that time believed, and ever since has believed, that said land so selected by it was agricultural in character and that it did not contain mineral, and that it did not contain deposits of coal, and believed that the land was neither mineral in character nor known to be such; and this defendant further avers that the defendants named in said decree referred to in Paragraph 3 of the Amended Bill of Complaint made several applications to the State of Utah and its Commission to select and obtain, in the name of the State, the land aforesaid, and that said defendants named in said decree referred to in Paragraph 3 of said Amended Bill of Complaint made agreements with the Board of Land Commissioners of the State of Utah to purchase said lands from the State; that these applications of purchase and agreements were based upon affidavits which affirmed that the lands so applied for were non-mineral in character and were not known to be mineral in character.

12. And the said defendant further avers that the State of Utah believed the statements contained in said affidavits and in said applications and acted innocently of any fraud in making said selection, and for that reason made said selection and made said contracts with the said defendants named in said decree set-forth in Paragraph 3 of said plaintiff's Amended Bill of Complaint, and agreed to sell said lands after they had been selected by the State to the said Milners and predecessors-in-interest of the Carbon County Land Company at the agreed price of $1.50 per acre.

13. And the said defendant further avers that the Secre-[fol. 25] tary of Interior of the United States approved the selection of said lands so made by the State, and said lands were thereupon certified to the State of Utah—the last certification being made in December, 1904; and the said defendant further avers that the title to said lands was by means of said certification, so approved by the Secretary of Interior of the United States of America, transferred from the United States to the State of Utah, and the floating grant or grants made by the United States in the Enabling Act aforesaid were thereby satisfied and discharged to the extent of the said 5564.28 acres, and that amount of land was then and there charged by the United States against the State of Utah in satisfaction of the grants made in said Enabling Act, and that charge so made has ever since remained, and still remains, as between the United States and the State of Utah.

14. And the said defendant further avers that the State of Utah, ever since said lands were so certified to it by the United States of America, and continuously until the issuance of its patent therefor to the Carbon County Land Company, has openly and in good faith claimed and maintained the legal title to said lands and all thereof, including the 1120 acres claimed by this defendant; that there has never been any determination that could bind the State of Utah that the lands were otherwise than as they were represented and believed to be at the time of said certification.

15. And the said defendant further avers that in January, 1907, the United States brought suit against the estate of Stanley B. Milner, deceased, and certain other Milners named in said suit, being the same persons as are named in the decree of 1914, and the Carbon County Land Company, successor-in-interest to said Milners, to set aside and annul the contracts which the said Milners had entered into with the State of Utah to purchase said lands; that said suit was founded on the charge that the certifications were procured by fraudulent representations of Milners and others since they knew at the time of the aforesaid applications that the lands contained coal deposits; and the said defendant admits and avers that in said suit the title of the United States was quieted as against the defendants

of a known mineral character; that the defendants named in the decree referred to in Paragraph 3 of the Amended Bill of Complaint made several applications to the said State of Utah and its Commission to select and obtain from the Federal Government, in the name of the State, the land aforesaid; that in accepting the applications to purchase said [fol. 35] land the State acted honestly and in good faith, and made agreements with the defendants named in the decree referred to in Paragraph 3 of the Amended Bill of Complaint, by and through its Board of Land Commissioners, under which agreements said defendants named in said decree agreed to purchase said lands and the State of Utah agreed to sell the same at the agreed purchase price of $1.50 per acre; that these applications to purchase and agreements were based upon affidavits which affirmed that the lands so applied for were non-mineral in character and were not known to be mineral in character.

5. And the State further avers that it believed the statements contained in said affidavits and in said applications, and acted innocently of any fraud in making said selection; that whatever investigation it made at the time did not reveal the untruth or falsity of said affidavits or the statements contained therein; that these affidavits and applications to purchase said land were submitted to the Secretary of Interior of the United States and that that officer, charged with a duty in the premises, made whatever investigation his duty required and approved the selection of said lands so made by the State and determined that the lands so selected by the State and approved by said Secretary of Interior were non-mineral in character, and said Secretary of Interior of the United States, after such investigation and approval, thereupon certified to the State of Utah (the last certification being made in 1904) the title to said lands; and the State of Utah further avers that title to said lands was, by means of said certification so approved by the Secretary of Interior of the United States of America, transferred from the United States to the State of Utah, and the floating grant or grants made by the United States in the Enabling Act aforesaid were thereby satisfied and discharged to the extent of the said 5564.28 acres, and that amount of land was then and there charged by the United States against the State of Utah in partial satisfaction of

the grants made in said Enabling Act, and that charge so made has ever since remained, and still remains, as between the United States and the State of Utah; and the State of Utah further avers that ever since said lands were so certified to it by the United States of America, and continuously until the issuance of its patent therefor to the Carbon County Land Company, said State of Utah has openly and in good faith claimed and maintained the legal title to said lands and all thereof; and the said State further avers that there has never been any determination that could in any wise bind the State of Utah that the lands were otherwise than [fol. 36] as they were represented and believed to be at the time of said certification and found to be by the Secretary of Interior in making said certification.

6. And the State of Utah further avers that in January, 1907, the United States brought suit against the estate of Stanley B. Milner, deceased, and certain other Milners associated with him, and the Carbon County Land Company, as successor-in-interest to said Milners, to set aside and annul the contracts which the said Milners entered into with the State of Utah to purchase said lands; that the said suit was founded on the charge that the certifications were procured by fraudulent representations of Milners and others since they knew at the time of the aforesaid applications that the lands contained coal deposits; that in said suit title of the United States was quieted as against the defendants named in said suit and in the decree made in said suit, but the State of Utah avers that it was not quieted as against the State of Utah because the State of Utah was not a party to said suit and did not in any wise participate or take part in said suit for the reasons hereinafter set-forth.

7. And the said State further avers that immediately before the commencement of said suit, on or about the eighth day of January, 1907, the Attorney General of the United States of America, acting by and through the then Special Assistant, said Attorney General so acting representing and appearing for and on behalf of the United States in bringing and prosecuting said suit, appeared before the Board of Land Commissioners of the said State of Utah and then and there before said Board represented to the State of Utah and to said Board, acting for said State, that the State of Utah had purposely not been made a party to

said suit; that the legal title to all said lands was in the State of Utah; that if the United States of America should be successful in said suit, title to all of said lands would still remain in the State of Utah, and that the United States of America did not by said suit seek to deprive the State of Utah of said lands or the title thereto but sought only to relieve the State from being held on said contracts of sale made and entered into between the State of Utah and the parties defendant named in said suit; and the said State of Utah further avers that the representations so made by the then representative of the United States, appearing as solicitor for said United States in said suit, commenced in January, 1907, were made before the assembled Board of Land Commissioners of the State of Utah for the purpose of keeping the State of Utah from in any wise intervening in or interfering with the prosecution of said suit by the [fol. 37] United States against the said Milners and the said Carbon County Land Company; and the said State further avers that said representations were made a part of its public records and were relied upon by the said State and believed to be true, and, in reliance thereon and in belief that said representations were true, the said State of Utah did not in any wise intervene in or participate in said suit, but continued to assert and maintain its ownership of said lands and continued to treat the same as if they had been conveyed by the United States to the State of Utah in partial satisfaction of the floating grants made in said Enabling Act; and the said State of Utah further avers that both the United States and the said State of Utah continued to and did rely upon said representations up until the commencement of this suit in May, 1924; and said State further avers that neither it nor the United States has at any time between the date of certification of said lands and the commencement of this suit in May, 1924, ever claimed any part of these lands to be lands of the United States, but that each and both of said sovereignties have considered the said floating grants as satisfied and discharged to the extent of the acreage of the lands described in said Amended Bill of Complaint.

8. And the said State of Utah further avers that the United States of America at no time since the bringing of said suit in 1907 has ever made any demand or request whatsoever on the State of Utah, or any of its officers, boards or depart-

ments, or any of its agents, that it should relinquish its title to said lands, or any part thereof, to the United States, or that it should convey, or attempt to convey, said lands, or any part thereof, to the United States; but, on the contrary, the State of Utah avers that at all times up until the commencement of the suit in May, 1924, the United States of America has permitted the State of Utah, without any question in regard thereto, to claim and have the ownership of said lands and each and every part thereof, and has at all times permitted the State of Utah to believe that the representations so made to it and its State Board of Land Commissioners by the Solicitor of the United States were true; and for these reasons the State of Utah denies that the United States believed at any time that the State of Utah would consider iself in any wise bound by the decree set-forth in Paragraph 3 of the Amended Bill of Complaint; and the said State of Utah avers that neither the United States nor it ever believed that the determination of the title to the land in question, as between the United States and the State of Utah, would be left to the Courts in the suit commenced in 1907, which resulted in the decree set-forth in Paragraph 3 of the Amended Bill of Complaint.

[fol. 38] 9. And the State of Utah further avers that it continued to own, hold and possess said lands and exercise all of the dominion that is incident to ownership and possession over the said lands until on or about the second day of January, 1920; that at that time, acting in good faith and believing the representations theretofore made by the Federal Government as aforesaid, the State entered into a new and independent contract with the Carbon County Land Company whereby the State agreed to sell and the Carbon County Land Company agreed to buy the 5564.28 acres of land at the purchase price of $100.00 per acre, and thereupon the Carbon County Land Company gave its notes to the State of Utah for the purchase price and a mortgage securing the payment of the indebtedness in the principal amount of $556,428; and the State of Utah avers that it now owns and holds said notes and mortgage securing the payment of the same as a continuing obligation of the said defendant, Carbon County Land Company, subject to the modification thereof made with the Independent Coal & Coke Company, as hereinafter set-forth; and under and pursuant

to said contract the State made and executed its State patent and delivered the same to the Carbon County Land Company, transferring its title to said lands to the Carbon County Land Company on February 10, 1920, and took back the mortgage for $556,428.

10. That thereafter, on the sixteenth day of October, 1920, the Independent Coal & Coke Company entered into an agreement with the Carbon County Land Company and with the State of Utah, whereby the Independent Coal & Coke Company bought from the Carbon County Land Company, and the Carbon County Land Company sold to the Independent Coal & Coke Company, all of Section 3, the north half of Section 10 and the northwest quarter of Section 11, in Township 13 South, Range 10 East; and the State of Utah avers that it is informed and believes, and therefore alleges the fact to be, that the Independent Coal & Coke Company paid to the Carbon County Land Company approximately 369,000 shares of the capital stock of the Independent Coal & Coke Company for the said 1120 acres of land; and the said State further avers that at the time of said transaction it had a separate and independent agreement with the Independent Coal and Coke Company whereby a segregation of the lands so purchased by said Company from the Carbon County Land Company, to-wit, 1120 acres, was made from the entire tract of 5564.28 acres, and by reason of this agreement the Independent Coal & Coke Company agreed directly with the State of Utah to assume and agree to pay, and did [fol. 39] assume and agree to pay, of the above mortgage indebtedness the sum of $100.00 per acre for each and every acre bought by the Independent Coal & Coke Company from said Carbon County Land Company, or $112,000 for the 1120 acres of land so purchased by said Independent Coal & Coke Company; and the State of Utah, as a part of said transaction, agreed with said Independent Coal & Coke Company to release said 1120 acres from the operation and effect of said mortgage when said Independent Coal & Coke Company had paid to the State of Utah the sum of $112,000.

11. And the said State further avers that immediately after it had sold said land it permitted the Carbon County Land Company and the Independent Coal & Coke Company to enter into possession of the respective portions purchased by each, and that immediately upon the issuance of its pat-

ent to said land the State of Utah caused all of the same to be placed upon the assessment rolls for the purposes of taxation; that taxes have been levied and assessed upon all of said property for each and every year, including the year 1920; and said State avers that the Independent Coal & Coke Company has paid approximately $40,000 in taxes for the years 1920, 1921, 1922 and 1923.

12. And the said State of Utah further avers that these transactions were honestly made in good faith, believing that the State was acting within its rights, and believing that the State was the true, lawful, legal and equitable owner of said land and all thereof; that both the mortgages and the State patents were filed for record, as is usual in the transfer of lands, and that there was nothing secret or clandestine about said transactions; and said State further avers that the plaintiff's cause of action, if any it ever had, to reclaim said land or any interest therein, accrued more than six years before the commencement of this suit in 1924; and that said cause of action, if any ever existed, is barred by the provisions of Section 8 of the Act of Congress of March 3, 1891, which in substance provides that suits to vacate, set aside or annul patents shall be brought within six years after the issuance thereof; and the said State avers that the plaintiff, United States of America, is now equitably estopped from claiming or asserting any rights in or to the lands described in plaintiff's complaint, and is now equitably estopped from asserting or claiming that the said mortgage of the State of Utah upon said lands is not in all respects legal, valid and enforceable, and is estopped from asserting any title to said lands which will in any wise impair or affect the said mortgage of this intervenor.

[fol. 40] 13. And the State of Utah further avers that said mortgage is in all respects a valid and enforceable obligation to the extent of the amount of the indebtedness secured thereby, and that the United States by this suit is seeking to impair the validity of said mortgage and to impair the validity of the claim of the State to a first lien upon said land resulting from said mortgage and that the United States by this suit has cast a cloud upon the title of the State to the land involved herein, and that if this suit is brought by the United States shall succeed and the prayer

of the Amended Bill of Complaint be allowed by decree of this Court, then in that event the lien of the State of Utah which would otherwise arise by reason of said mortgage will be absolutely destroyed; that if the United States is decreed by this Court to be the legal and equitable owner of the lands involved in this suit, then that decree has the legal effect of declaring as absolutely void the mortgage of the State of Utah; and the State avers that no part of said mortgage indebtedness has been paid, by either the Independent Coal & Coke Company or by the Carbon County Land Company, or by any person in behalf of either of said companies; and the State further avers that all of the land except the 1120 acres purchased by the Independent Coal & Coke Company has been sold for taxes lawfully assessed thereon for the years 1920, 1921, 1922 and 1923, and that Carbon County of the State of Utah, as a subsidiary of the State, now claims to own all of said lands under and by virtue of a tax deed made pursuant to a tax sale, and that the State is interested to the extent of the State taxes, which should have been collected upon said land for the years 1921, 1922, 1923 and 1924.

14. And the State further avers that the adverse claims made by the United States as against this land are void and without merit, and are unlawful and adverse to the rights of the State of Utah in said land, and cloud the title thereof and impair the State's mortgage security; that the State is the owner of a first lien upon said lands for the purpose of enforcing the indebtedness due to it in the sum of $556,428, free from any and all claims of the United States.

Wherefore this intervenor, the State of Utah, prays that the title to said lands be quieted as against all claims of the United States; that the State of Utah be decreed to have a first lien upon said land to the extent of $556,428; that the mortgage herein referred to be decreed to be a valid and enforcible obligation, and that the Court decree that said lands have been subject to taxation ever since the year 1920, and that it determine the amount of taxes due thereon.

[fol. 41] And the State further prays for all general, proper and equitable relief.

Harvey H. Cluff, Attorney General of the State of Utah.

[File endorsements omitted.]

IN UNITED STATES DISTRICT COURT

MOTION TO VACATE ORDER PERMITTING STATE OF UTAH TO INTERVENE—Filed Nov. 19, 1928

Comes now the United States of America, the above named plaintiff, through the United States Attorney for the District of Utah, acting under the direction of the Attorney General of the United States, and moves the Honorable Court to vacate the Consent Order hereintofore entered permitting the State of Utah to intervene in the above entitled action.

Dated this 19th day of November, A. D. 1928.

Chas. M. Morris, United States Attorney.

(Notice)

To the State of Utah and Harvey H. Cluff, Attorney General of the State of Utah, Attorney for the State of Utah:

You and each of you will please take notice that the plaintiff in the above entitled cause will, on Wednesday, the 21st day of November, A. D. 1928, at the hour of Ten o'clock A. M., at the court room of the above entitled court, move the Honorable Court to vacate the Consent Order heretofore entered permitting the State of Utah to intervene in the above entitled matter, a copy of which motion is hereto attached and made a part hereof.

Dated this 19th day of November, A. D. 1928.

Chas. M. Morris, United States Attorney.

[fol. 42] Copy of the foregoing Notice and Motion received this 19th day of November, A. D. 1928.

Harvey H. Cluff, by John H. Wooton, Attorney General of the State of Utah, Attorney for Intervenor.

[File endorsement omitted.]

Order setting said motion for hearing November 26, 1928, made and entered of record November 21, 1928, in this cause as follows, to wit:

At this 21st day of November, 1928, comes Charles M. Morris, United States Attorney, and upon his motion it is ordered that the hearing of plaintiff's motion filed herein

on November 19, 1928, to vacate the consent order in the forenoon of Monday, the 26th day of November, 1928.

IN UNITED STATES DISTRICT COURT

RESPONSE OF PLAINTIFF TO APPLICATION FOR THE STATE OF UTAH TO INTERVENE—Filed Nov. 26, 1928

Comes now the United States of America, the plaintiff herein, through its Attorney General and by Counsel acting under his direction, and separately objects to the granting in this cause of the application of the State of Utah to intervene, made for said State by and through its Attorney General, Harvey H. Cluff, and as grounds for said objections alleges:

I

That the United States has not consented to be sued by the State of Utah, and that the petition of intervention filed with, or as, such application to intervene is, in effect, a suit against the United States.

II

That the United States brings this suit to obtain the benefit of a judgment rendered in a case to which the State of Utah was not a party. That the State of Utah is a stranger to the action, and is not a proper party, and by its proposed petition of intervention attempts to subordinate the suit of the United States against the defendant to a suit by the State of Utah against the United States, to quiet the title of the State to the land in question.

[fol. 43]

III

That the proposed petition of intervention, exhibited to the Court, does not show such an interest in the subject matter of this suit as entitled the State of Utah to intervene and be made a party thereto, or to pray for and have awarded to it any relief therein.

IV

That the petition of intervention exhibited to the Court is a complaint for affirmative relief that is not available to

the original defendants, and to which the original defendants are not entitled.

V

That the original suit was filed in 1907, and the supplemental suit now pending was filed on the 16th day of May, 1924, and during all that time the State of Utah has failed to assert any claim or right in and to the property involved until the application to intervene now made.

B. M. Parmenter, Assistant Attorney General. Nat M. Lacy, Special Assistant to the Attorney General. Charles M. Morris, United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER VACATING FORMER CONSENT ORDER PERMITTING STATE OF UTAH TO INTERVENE—Filed Nov. 26, 1928

The motion of the plaintiff to vacate the consent order, heretofore entered, permitting the State of Utah to intervene in the above entitled cause, coming on regularly for hearing the 26th day of November, 1928, and it appearing that said order was inadvertantly made and entered.

It is hereby ordered that said consent order be and the same is hereby vacated and set aside over the objections of the State of Utah.

Dated this 26th day of November, 1928.

Tillman D. Johnson, Judge.

[File endorsement omitted.]

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER GRANTING PERMISSION FOR STATE OF UTAH TO FILE COMPLAINT IN INTERVENTION—Filed Nov. 26, 1928

Upon the granting by the Court of the motion of the plaintiff in the above entitled cause to vacate and set aside, over the objections of the State of Utah, the consent order,

theretofore entered permitting the State of Utah to intervene in said cause, the State of Utah, through Harvey H. Cluff, Esquire, its Attorney General, orally moved the Court to permit the State of Utah to intervene and to file its offered complaint in intervention in the above entitled cause; that thereupon the plaintiff, through the United States Attorney for the District of Utah, filed the written objections of the plaintiff to the application of the State of Utah to intervene in said cause, and the matter being then argued and submitted, and the Court being fully advised in the premises.

It is hereby ordered that the State of Utah be and it is hereby permitted to intervene in the above entitled cause and to file, over the objections of the plaintiff, its offered complaint in intervention in said cause, and that the plaintiff is hereby granted thirty days from date of this order within which to plead to the complaint in intervention of the State of Utah.

Dated this 26th day of November, 1928.

Tillman D. Johnson, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF CARBON COUNTY LAND COMPANY TO AMENDED BILL OF COMPLAINT—Filed Nov. 26, 1928

Now comes the Carbon County Land Company, and answering the Amended Bill of Complaint of the plaintiff, admits, denies and alleges as follows, to-wit:

1. It admits that it is a corporation organized under the laws of the State of Utah, and that said corporation has its principal office and place of business in Salt Lake City, Utah; and it further admits that the Independent Coal & Coke Company is a corporation organized and existing under the laws of the State of Wyoming, and duly authorized to do business in the State of Utah, and that it has its office and principal place of business in Salt Lake City, Utah; and it further admits paragraphs 2, 3 and 4 of said Amended Bill of Complaint.

2. This defendant further admits and alleges that the State of Utah was not made a party to said suit referred to [fol. 45] in paragraphs 3 and 4 of said Amended Bill of Complaint, but this defendant denies that it was believed by the United States that the State of Utah would leave to the determination of the courts the question of right between the Government and those who had misused the agency of the State in acquiring title to the lands; and denies that it was believed by the United States that the State of Utah would conform its subsequent action to that determination; and this defendant further admits and affirmatively avers that the State of Utah in no wise participated in the defense of the suit referred to in Paragraphs 3 and 4 of said Amended Bill of Complaint; and further avers that whatever was determined as a matter of law or fact in said suit was and is in no wise binding upon the State of Utah; and further avers that the extent of the determination made by the decree set forth in paragraph 3 of said Amended Bill of Complaint was merely to annul the contracts entered into between the State of Utah and the defendants named in said decree.

3. It further admits and affirmatively avers that it was not the purpose of said suit to in any wise disturb or interfere with or vacate or annul the title of the State of Utah to the lands described in said decree, but on the contrary it was merely the purpose of the United States to annul the aforesaid contracts entered into between the State of Utah and the defendants named in said decree, and to leave the title to the lands deseribed in said decree vested in the State of Utah, free from said contracts or from any right that might arise therefrom.

4. And the said defendant further avers and admits that the State of Utah continued to hold, possess and own said lands, free from said contracts or any right that might arise therefrom, until February 10, 1920; and the said defendant further admits and avers that these lands were, as between the United States and the State of Utah, at the time of the certification by the United States to the State of Utah, and ever since have been, non-mineral in character, and have never, as between said United States of America, and the

State of Utah, been known to be mineral in character, and that while the aforesaid decree finds and adjudicates that said lands are mineral in character, and were known to be such at the time of said certification, still said decree does not and could not and did not adjudicate that fact as to the State of Utah, because the State of Utah was not a party to said suit and did not in any wise or at all partici- [fol. 46] pate in the defense thereof; and the said defendant further admits and affirmatively avers that the title in said lands continued to be vested in the State of Utah, and that the State of Utah continued to hold, own and possess said lease until that title had, by reason of lapse of time, to-wit: more than six years from the date of certification, ripened into a perfect and absolute title as against all claims that could be made or asserted by the United States as against the State of Utah.

5. And the said defendant further admits and affirmatively avers that on or about February 10, 1920, when the State of Utah was the absolute owner of said lands, free from any and all claim or claims of the United States, the State of Utah sold said lands to this defendant for the agreed purchase price of $100.00 per acre; and the said defendant further admits and affirmatively avers that this transaction was entirely independent of the transaction which was involved in the suit decided in 1914, and was made by the State of Utah in its capacity as the owner of said lands and not as a trustee, either actual or constructive, of the United States of America; and the said defendant further admits and affirmatively avers that the State of Utah issued its patent or deed to said lands to this defendant, relying upon and believing that it was the true and lawful owner of said lands, and that the decree made and entered in 1914 in no wise interfered with or disturbed its legal or equitable title to said lands.

6. This defendant further admits that the Independent Coal & Coke Company claims to be, and avers that it is, the owner of Section 3, and the North Half of Section 10, and the Northwest Quarter of Section 11, in Township 13 South, Range 10 East; and said defendant avers that it conveyed by warranty deed the said land last above described to the defendant Independent Coal & Coke Company, on or about October 16, 1920, under circumstances more particularly in

this answer set forth; and the said defendant further admits and affirmatively avers that as a consideration for said conveyance made by it, as aforesaid, the said Independent Coal & Coke Company issued and delivered to this defendant approximately 369,000 shares of its capital stock; that said capital stock had a par value of one dollar per share, and a market value, at the time of said issuance and delivery, in excess of fifty cents per share; and the said defendant further admits and avers that the Independent Coal & Coke Company, as a part of said transaction and in addition to the consideration paid, to-wit 369,000 shares, agreed to assume and did assume and agree to pay to the State of Utah the sum of $12,000.00 or $100.00 per acre for [fol. 47] each and every acre of land in this paragraph above described; and the said defendant upon information and belief admits and avers that the State of Utah entered into an agreement with the Independent Coal & Coke Company whereby it was permitted to buy said 1120 acres of land from this defendant, and was permitted to assume and agree to pay said mortgage indebtedness of $112,000.00, and whereby the State of Utah was obligated to release said lands from the operation and effect of said mortgage upon the payment by the Independent Coal & Coke Company to the State of Utah the said $112,000.

7. This defendant further avers that while it knew that the suit referred to in Paragraphs 3 and 4 of the Amended Bill of Complaint had been tried and determined between the United States and the defendants named in the said decree set forth in Paragraph 3 of said Amended Bill of Complaint, it also knew and relied upon the fact that the State of Utah was not a party to that suit, and this defendant did not believe that the State of Utah was in any wise bound by that decree or any part thereof; and this defendant further avers that it also knew that the United States of America had on or about the eighth day of January, 1907, immediately prior to the commencement of the suit which resulted in the decree set forth in Paragraph 3 of said Amended Bill of Complaint, represented to the State of Utah that it was no part of the purpose of said suit to in any wise disturb or affect the title of the State of Utah to the lands described in said suit and in said decree; and this defendant further avers that it knew that the State

of Utah had claimed ownership of these lands from the date of the certification up to and including February 10, 1920; it knew that the State of Utah had been offering said lands for sale; it knew that the United States of America had knowledge of that fact, and had made no effort to reclaim or reobtain said lands from the State of Utah; and the said defendant further avers that the 4444.28 acres above described now claimed by this defendant, were in part adjacent to and in part contiguous to other lands owned by the defendant herein; that if these lands were to be the subject of private ownership, and were to be sold to competitors, it would become intensely inconvenient and embarrassing to this defendant in the development of its properties and other lands adjacent and contiguous to said 4444.28 acres of land.

8. The defendant denies that the lands which it claims, or the Independent Coal & Coke Company claims, and described in Paragraph 2 of plaintiff's Amended Bill of [fol. 48] Complaint, had been determined to be mineral lands as between the United States and the State of Utah, and denies that such lands were not the subject of selection by the State, and avers that the decision of this Court, made in 1914 and affirmed by the Circuit Court of Appeals of the United States for the Eighth Circuit in 1915, in any wise or at all determined the mineral or non-mineral character of said lands as between the State of Utah and the United States.

9. And the said defendant, further answering said Amended Bill of Complaint, affirmatively avers that the State of Utah was admitted to the Federal Union on January 4, 1896; that prior to its admission to the Union the Congress of the United States enacted the Enabling Act on July 16, 1894, in order to enable the people of Utah to form a constitution and a state government and to be admitted into the Union on an equal footing with the original states; that in lieu of the grant of lands for the purposes of internal improvement made to new states by the eighth section of the Act of September 4, 1841, and in lieu of any claim or demand by the State of Utah under the Act of September 28, 1850, and Section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, certain grants of land were made to the

State of Utah for the establishment of water reservoirs for irrigating purposes, for the establishment and maintenance of insane asylums, schools of mines, deaf and dumb asylums, reform schools, normal schools, institutions for the blind, miners' hospitals and for educational purposes; that by the terms of said Enabling Act it was provided that the State of Utah should not be entitled to any further or other grants of land for any purpose other than that expressly provided for in said Act; and the State of Utah accepted said grants and entered into and became a part of the Federal Union by and through the terms of said Enabling Act, and thereby surrendered any and all claim it had to lands comprised within the then Territory of Utah, now the State of Utah.

10. That after the admission of the State of Utah into the Union the State organized a Board of Land Commissioners, with general supervisory power over the disposition of lands granted to it by the United States under said Enabling Act, and with authority to select particular lands by reason of the floating grants made in said Enabling Act; that from time to time the State did select certain lands; that when any selection was made by the State from out of the lands covered by said grants contained in said Enabling Act, then that amount of land so selected by the State was charged by the Federal Government as against [fol. 49] the State of Utah, and the grant theretofore made to the State was thereby reduced to the extent of the acreage of the lands so selected by the State.

11. That between December 10, 1900, and December, 1904, the State selected the lands described in the decree set forth in Paragraph 3 of the plaintiff's Amended Bill of Complaint, consisting of 5564.28 acres; that the State at that time believed, and ever since has believed, that said land so selected by it was agricultural in character and that it did not contain mineral, and that it did not contain deposits of coal, and believed that the land was neither mineral in character nor known to be such; and this defendant further avers that the defendants named in said decree referred to in Paragraph 3 of the Amended Bill of Complaint made several applications to the State of Utah and its Commission to select and obtain, in the name of the State, the land aforesaid, and that said defendants named in said decree

referred to in Paragraph 3 of said Amended Bill of Complaint made agreements with the Board of Land Commissioners of the State of Utah to purchase said lands from the State; that these applications of purchase and agreements were based upon affidavits which affirmed that the lands so applied for were non-mineral in character and were not known to be mineral in character.

12. And the said defendant further avers that the State of Utah believed the statements contained in said affidavits and in said applications and acted innocently of any fraud in making said selection, and for that reason made said selection and made said contracts with the said defendants named in said decree set forth in Paragraph 3 of said plaintiff's Amended Bill of Complaint, and agreed to sell said lands after they had been selected by the State to the said Milners, the then predecessors in interest of this defendant at the agreed price of $1.50 per acre.

13. And the said defendant further avers that the Secretary of Interior of the United States approved the selections of said lands so made by the State, and said lands were thereupon certified to the State of Utah,—the last certification being made in December, 1904; and the said defendant further avers that the title to said lands was by means of said certification, so approved by the Secretary of Interior of the United States of America, transferred from the United States to the State of Utah, and the floating grant or grants made by the United States in the En-
[fol. 50] abling Act aforesaid were thereby satisfied and discharged to the extent of the said 5544.28 acres, and that amount of land was then and there charged by the United States against the State of Utah in satisfaction of the grants made in said Enabling Act, and that charge so made has ever since remained, and still remains, as between the United States and the State of Utah.

14. And the said defendant further avers that the State of Utah, ever since said lands were so certified to it by the United States of America, and continuously until the issuance of its patent or deed therefor to this defendant, has openly and in good faith claimed and maintained the legal title to said lands and all thereof; that there has never been any determination that could bind the State of

Utah that the lands were otherwise than as they were represented and believed to be at the time of said certification.

15. And the said defendant further avers that in January, 1907, the United States brought suit against the estate of Stanley B. Milner, deceased, and certain other Milners named in said suit, being the same persons as are named in the decree of 1914, and this defendant, successor in interest to said Milners, to set aside and annul the contracts which the said Milners had entered into with the State of Utah to purchase said lands; that said suit was founded on the charge that the certifications were procured by fraudulent representations of Milners and others since they knew at the time of the aforesaid applications that the lands contained coal deposits; and the said defendant admits and avers that in said suit the title of the United States was quieted as against the defendants named in said suit and in said decree; but this defendant avers that it was not quieted as against the State of Utah because the State of Utah was not a party to said suit or to said decree; and the said defendant further avers that immediately upon the commencement of said suit, on or about the eighth day of January, 1907, the Attorney General of the United States of America, acting by and through the then Special Assistant, the said Attorney General representing and appearing for and on behalf of the United States in bringing and prosecuting said suit, made and represented to the State of Utah and to its then State Board of Land Commissioners, that the State of Utah had purposely not been made a party to said suit; that the legal title to all of said lands was in the State of Utah, and that if the United States of America should be successful in said suit, the title to all of said lands would still remain in the State of Utah, and that the United States of America did not by said suit [fol. 51] seek to deprive the State of Utah of said lands, or the title thereto, but sought only to relieve the State of Utah from being held on said contracts of sale made and entered into between the State of Utah and the parties defendant named in said decree and set out in Paragraph 3 of said Amended Bill of Complaint; and this defendant further avers that said representations so made by the then representative of the United States of America, appearing as solicitor for said United States in said suit com-

menced in January, 1907, were made before the assembled Board of Land Commissioners of the State of Utah for the purpose of keeping the State of Utah from in any wise intervening in or interfering with the prosecution of said suit by the United States; against the said Milners and this defendant; and the State of Utah made said representations a part of its public records and relied upon the same, and, relying upon the same and believing them to be true, the said State of Utah did not in any wise intervene in or participate in said suit, but continued to assert and maintain its ownership of said lands and continued to treat the same as if they had been conveyed by the United States to the State of Utah in partial satisfaction of the floating grants made in said Enabling Act; and said defendant avers that both the United States and the State of Utah continued to and did rely upon said representations up until the commencement of this suit in May, 1924; and this defendant further avers that neither the State of Utah nor the United States has at any time between the date of certification of said lands and the commencement of this suit in May, 1924, ever claimed any part of these lands as lands of the United States, but that each and both of said sovereignties have considered the floating grants as satisfied and discharged to the extent of the acreage of the lands described in said Amended Bill of Complaint.

16. And the defendant further avers that the United States of America at no time since the bringing of said suit in 1907 has ever made any demand or request whatsoever on the State of Utah, or any of its officers, boards or departments, or any of its agents that it should relinquish its title to said lands or any part thereof to the United States, or that it should convey, or attempt to convey, said lands or any part thereof to said United States of America, but at all time up until the commencement of this suit in May, 1924, the United States of America permitted the State of Utah, without any question in regard thereto, to claim and have the ownership of said lands and each and every part thereof, and at all times permitted the State of Utah to believe that the representations so made to it through [fol. 52] its State Board of Land Commissioners were true, and for these reasons this defendant denies that the United States believed at any time that the State of Utah would

consider itself in any wise bound by the decree set forth in Paragraph 3 of the Amended Bill of Complaint; but, on the contrary, this defendant asserts and avers that neither the United States nor the State of Utah ever believed that the determination of the title to the land in question, as beween the United States and the State of Utah, would be left to the courts in the suit commenced in 1907, which resulted in the decree set forth in Paragraph 3 of the Amended Bill of Complaint.

17. And this defendant further avers that the State of Utah continued to own, hold and possess said lands until on or about the second day of January, 1920; that at that time, acting in good faith, and believing the representations theretofore made by the Federal Government as aforesaid, the State entered into a new and independent contract with it; that while it was a successor in interest to Stanley B. Milner, this defendant committed no fraud upon the Government, but had merely purchased the contracts which the decree adjudged to have been fraudulently obtained; that the contract entered into between it and the State of Utah in January, 1920, was entirely new and independent of the contracts which the State had made with Milner between December, 1900, and December, 1904; that by the contract of January 2, 1920, the State agreed to sell and this defendant agreed to buy the 5564.28 acres of land at the purchase price of $100.00 per acre; that the State of Utah, believing that it owned said lands, free from any claim of the Government, conveyed the same to this defendant and took its notes for the purchase price and a mortgage securing the payment of said indebtedness for the principal amount of $556,428; and this defendant avers that the State of Utah now holds and owns said notes and mortgage as a continuing obligation of this defendant; and this defendant avers that it acted in good faith and relied upon the certifications made by the Government to the State of Utah, and relied upon the representations made by the Government to the State of Utah in January, 1907; and this defendant avers that it believed that the State of Utah had good title to said lands and the right to dispose thereof; and this defendant avers that in reliance upon said representations so made in January, 1907, as aforesaid, the State of Utah executed and delivered to this defendant its patent for said lands and all thereof.

18. And this defendant further avers that thereafter, to-
[fol. 53] wit, on or about the sixteenth day of October, 1920, it sold to said defendant, Independent Coal & Coke Company, all of Section 3, the north half of Section 10 and the northwest quarter of Section 11, in Township 13 South, Range 10 East, and received the 369,000 shares of the capital stock, as has been hereinbefore alleged; and the said defendant further avers that at the time of said transaction a separate and independent agreement was made with the State of Utah whereby a segregation of the lands so sold by this defendant to the Independent Coal & Coke Company, to-wit, 1120 acres, was made from the entire tract purchased by it, and by reason of said agreement the Independent Coal & Coke Company became obligated to the State of Utah for $112,000, and the State of Utah agreed with this defendant and with the Independent Coal & Coke Company to release the 1120 acres from the operation and effect of said mortgage when the Independent Coal & Coke Company had paid to the State of Utah the sum of $112,000.

19. This defendant denies that it at any time ever in any wise misrepresented the character of said lands to any person, and denies that it at any time ever undertook to aid or abet either the State of Utah, or any other person, in fraudulently obtaining title to these lands; and, on the contrary, this defendant asserts that it has at all times acted in good faith, and has at all times believed that the title to the lands so purchased by it was in the State, free from any claim of the United States; and said defendant further avers that it purchased said lands from the State of Utah, as is herein alleged, and executed its mortgages to the State of Utah in the sum of $556,428.00, without having any notice or knowledge, either actual or constructive, of any adverse claim or claims of any nature of the United States; and the said defendant avers that it did not know that the United States was making or ever intended to make and claim to the said land until this suit was commenced in May, 1924.

20. This defendant avers that the lands now claimed by it, to-wit, 4444.28 acres, were so situated with reference to the other property of this defendant that if said lands were to become the subject of private ownership this defendant was required for its own protection, by reason of the situa-

tion of said lands, to make all reasonable effort to obtain title thereto; and this defendant further avers that it knew said lands had been certified by the plaintiff to the State of Utah, and knew of the representations aforesaid made to the State Board of Land Commissioners of the State of Utah, and knew that the decree of 1914 set forth in Para- [fol. 54] graph 3 of plaintiff's Amended Bill of Complaint had never been in any wise asserted as against the State of Utah, and knew that no effort had been made by the United States to reobtain the title to said lands from the State of Utah, and knew that no demand had been made by the United States upon the State of Utah, for a reconveyance of said lands. This defendant believed that the State of Utah was the true and lawful owner of said lands, and, so believing, this defendant purchased said lands as aforesaid.

21. And this defendant further avers that immediately after obtaining its patent or deed from the State of Utah on February 10, 1920, this defendant entered into possession of said lands and has ever since occupied the same, has leased the same to sheep and cattle men for grazing purposes, and the State of Utah caused all of said lands to be placed upon the assessment rolls for purposes of taxation, and that taxes have been levied and assessed upon all of said property for each and every year, including the year 1920; that this defendant has paid in taxes in excess of $15,000.00; that that amount was paid by this defendant as State, County and School taxes between the time of the issuance of the patent by the State of Utah and prior to the commencement of this suit by the United States.

22. And the defendant further says that the mortgages made upon this land to the State of Utah, as aforesaid, for the purchase price of said land from the State of Utah by this defendant were, within a short time after the execution and delivery of said mortgages, duly recorded in Carbon County, Utah; that the patents or deeds made by the State of Utah to this defendant were duly filed for record with the County Recorder and Register of Deeds of Carbon County, Utah; with those facts, together with the fact that this defendant had taken possession of said land, and together with the fact that the land was being assessed by.

the State of Utah for taxes and by the various subdivisions of said State, were all known to the plaintiff as early as 1920; that the plaintiff likewise knew at the time of the certifications in 1901 and 1904 that these lands were claimed by the State of Utah, and that the dominion incident to ownership was exercised by the State of Utah, and yet, notwithstanding all of said facts and circumstances, the plaintiff never attempted to assert any title as against the State of Utah or its grantees, including this defendant, until May, 1924, when it commenced this suit.

23. And the said defendant further avers that from the time of Statehood down until the time when the first suit [fol. 55] was commenced in January, 1907, this land was classified by both the Government and the State as agricultural grazing land and not as coal land; that even after the first suit was commenced in January, 1907, down until May, 1924, when this suit was commenced, no claim was ever made by the Government as against the State of Utah that said land should be classified as coal land, but, on the contrary, the Government continuously represented and claimed to the State of Utah that the title to the land should pass and had passed from the Government to said State, and that the title of the State should not be at any time reclaimed by the Government as against the State. This defendant therefore avers that the plaintiff's cause of action, if any it ever had, accrued more than six years before the commencement of this suit in May, 1924, and that the action is barred by the provisions of Section 8 of the Act of Congress of March 3, 1891, which in substance provides that suits to vacate, set aside or annul patents shall be brought within six years after the issuance theerof; and this defendant therefore avers that because of the facts and circumstances, and particularly because of the representations made by the Government and because of the fact that the State of Utah and this defendant relied upon said representations, and because of the fact that this defendant has sold and delivered by warranty deed 1120 acres of said land to the Independent Coal & Coke Company, and because of the fact that this defendant has been leasing the balance of said land to sheep and cattle men for grazing purposes, and because of the fact that it has paid over $15,000.00 in taxes upon said land, and because of the fact that it is un-

able to recover said amount so paid out, this defendant avers that the plaintiff is now equitably estopped from asserting any rights in or to the land involved in this Answer; and the said defendant further avers that the title of the State of Utah was on February 10, 1920, at the time it issued its patent to this defendant, absolute, complete and invulnerable as against any attack by the United States, and that therefore the State of Utah might sell as it did, to any person whomsoever, and that the mortgage given by this defendant, as aforesaid, to the State of Utah, for $556,428.00 is valid and enforcible obligation in favor of the State, and that the United States cannot equitably reclaim said land without at least first transferring to the State other lands in lieu of the lands involved in this suit and without repaying to this defendant the sums expended by said defendant in the honest belief that it had a right to buy said lands from the State of Utah, as aforesaid; and the said defendant further avers that the claim [fol. 56] attempted to be asserted by the Government in this action is without equity and is unconscionable, and that the title of this defendant, both legal and equitable, is absolute and complete as against all claims of every person whomsoever, except the State of Utah, which holds the mortgage for $556,428.00 upon the land involved in this Answer.

Wherefore, having fully answered the Amended Bill of Complaint of the plaintiff, this defendant prays judgment that the Government be denied the relief prayed for in its Amended Bill of Complaint; that it take nothing by reason thereof, and that this defendant have judgment quieting its title to said 4444.28 acres of land claimed herein by it as against all claims, legal or equitable, that can be made by the United States.

And the said defendant further prays for all general and proper relief.

King & King, Attorneys for Carbon County Land Company.

Duly sworn to by A. C. Milner. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

REPLICATION OF PLAINTIFF TO ANSWER OF INDEPENDENT COAL & COKE COMPANY—Filed Nov. 27, 1928

Now comes the above named plaintiff and files its replication to the answer of defendant Independent Coal & Coke Company herein and alleges as follows:

1. Realleges as true the allegations contained in bill of complaint.

2. Admits that the Carbon County Land Company executed and delivered a warranty deed to the defendant Independent Coal & Coke Company on or about October 16, 1920, and subsequent to the issuance by the State of its patent of said land to the Carbon County Land Company on February 10, 1920, and alleges that the Independent Coal & Coke Company is bound by the judgment, decree and proceedings in the case of United States of America v. Truth A. Milner, Administratrix of the estate of Stanley B. Milner, deceased, Truth A. Milner, Harley O. Milner, Carbon County Land Company, a corporation, and Peter N. Campbell, pleaded and referred to in the bill of complaint herein and that whatever title in and to the land in question inured to the defendant Independent Coal & Coke Company by reason of said conveyance is held by it for the benefit of the United States.

3. Admits the admission of Utah to the federal Union as alleged, the enactment of the Enabling Act of July 16, 1894, by which Utah was enabled to form a Constitution and State government, but avers that the land in question being mineral in character never passed to the State of Utah under the grants alleged in paragraph 9 of said answer, and being known coal land at the time of the certification of the same to the State of Utah did not pass to the State and no equitable title vested in the State by reason of such certification.

4. Admits the selection of the lands in question by the State as alleged in paragraph 11 of the said defendant's answer, but avers that said selection was induced by fraud as determined in the case of United States of America v. Truth A. Milner et al. above referred to, and that the lands

in question were known mineral lands at the time of the selection thereof as determined by the Court in said suit.

5. Admits that the State of Utah acted innocently of any fraud in the making of said selection, but denies that the said 5564.28 acres of land involved stands charged by the United States against the State of Utah or could properly have been charged against the State at the time of the cer- [fol. 58] tification of the same to the State or thereafter for the reason that they were at all said times known coal lands and so not subject to selection by the State, and not within the grant contained in the Enabling Act referred to in defendant's answer.

6. Denies that the State of Utah has openly and in good faith claimed title to said lands since the certification thereof to it by the United States as alleged in paragraph 14 of this defendant's answer, and alleges that since the filing of the suit in the said case of United States of America v. Truth A. Milner et al. on January 8, 1907, and until the filing of its application to intervene in this action on the — day of October, 1928, the State of Utah with full knowledge of the said litigation and of the proceedings in this suit has asserted no claim whatever to any of said lands.

7. Denies that any representative of the Attorney General of the United States having authority to bind the United States made the representations as to the object of the suit in the case of United States of America v. Truth A. Milner et al., alleged in paragraph 15 of this defendant's answer, and avers that if such representations were made they were wholly unauthorized and in no way binding upon the United States and that the State of Utah was in no way deceived thereby or relied thereon.

8. Denies that the United States in any way or at any time acted in such a way as to mislead the State of Utah or to permit the State to claim the ownership of the lands in question, but alleges that the United States has since January 7, 1927, asserted its right and title to said lands in the Courts with the full knowledge of the State of Utah and its officials.

9. Alleges that the contract mentioned in paragraph 17 of this defendant's answer between the State of Utah and

the Carbon County Land Company and the transactions mentioned and set out in paragraph 18 of this defendant's answer were all subsequent to the determination of the case of United States of America v. Truth A. Milner et al., and were made with full knowledge of the fraud found by the Court in the said Milner suit, of the known mineral character of the land at the time of the certification to the State and of the proceedings in said Milner suit, and were of no validity or effect as vesting any equitable title to the lands in question in this defendant.

10. Avers that the lands in question have at all times been and now are a part of the public domain of the United [fol. 59] States of America and have not been and are not now subject to taxes by the State of Utah.

11. Avers that the provisions of section of the Act of Congress of March 3, 1891, pleaded by defendant, is in no wise a bar to this action and that that question has been determined by the United States Supreme Court in this suit.

Wherefore, the plaintiff having fully replied to the answer of defendant Independent Coal & Coke Company herein tenders the issue thus joined for the consideration of the Court.

B. M. Parmenter, Assistant Attorney General. Nat M. Lacy, Special Assistant to the Attorney General. Charles M. Morris, United States Attorney.

Service acknowledged and copy received this 27th day of November, 1928.

M. E. Wilson, A. R. Barnes, Attys. for Independent Coal & Coke Co.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF PLAINTIFF TO STRIKE ANSWER AND COUNTERCLAIM OF STATE OF UTAH—Filed Dec. 19, 1928

Comes now the complainant, the United States of America, by its solicitors and moves the court to strike out the

answer and counterclaim of the intervening defendant, the State of Utah, for the following reasons:

1. Because this court is without jurisdiction to entertain the affirmative defense and counterclaim pleaded by the defendant intervener, for the reason that exclusive original jurisdiction is vested in the Supreme Court of the United States to try and determine the issues pleaded by the defendant State of Utah in its said affirmative defense and counterclaim.

2. Because the facts alleged in the complaint in intervention of the State of Utah by way of an affirmative defense [fol. 60] and the answer to the complaint herein are wholly insufficient to constitute a valid cause of action in equity against the complainant or to constitute a defense to the bill of complaint herein.

B. M. Parmenter, Assistant Attorney General. Nat M. Lacy, Special Assistant to the Attorney General. Charles M. Morris, United States Attorney.

Copy of foregoing motion received this 19th day of December, A. D. 1928.

Harvey H. Cluff, Attorney for State of Utah.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO STRIKE ANSWER AND COUNTERCLAIM OF INTERVENER—Jan. 26, 1929

At this 26th day of January, 1929, comes said plaintiff by Charles M. Morris, United States Attorney, and said defendants by Sam A. King and M. E. Wilson, their attorneys, also come. And the motion of plaintiff to strike out the answer and counterclaim of said intervener, coming on regularly to be heard, the same is argued and submitted and the Court being well advised in the premises, doth deny said motion, with leave to complainant within ten days to file

its answer to said answer and counterclaim of said intervening defendant. And thereupon it is ordered by the Court that this cause be set down for trial on February 18, 1929.

IN UNITED STATES DISTRICT COURT

REPLICATION OF PLAINTIFF TO ANSWER OF CARBON COUNTY LAND COMPANY—Filed Feb. 14. 1929

Comes now the plaintiff and for its replication to the answer of defendant Carbon County Land Company, saving and reserving unto itself all manner of advantage of exception to the manifold insufficiencies of said answer, avers and alleges:

[fol. 61] 1. That it will prove its bill of complaint herein to be true and sufficient and that the answer of the said defendant is uncertain and insufficient to constitute a defense to the action alleged in the plaintiff's said bill.

2. Denies the allegation of paragraph 3 of defendant's answer.

3. Denies that the transaction pleaded and referred to in paragraph 5 of the defendant's answer was entirely independent of the transaction involved in the suit decided in 1914 and referred to in paragraph 3 of the plaintiff's bill of complaint and denies that the State of Utah on or about February 10, 1920, was the absolute owner of said lands as therein alleged.

4. Admits that the defendant executed and delivered its warranty deed to defendant Independent Coal & Coke Company on or about October 16, 1920, but avers that it is without information as to the transactions affecting the capital stock of the Independent Coal & Coke Company as alleged in parargraph 6 of this defendant's answer and the agreement therein alleged by which it is averred that the Independent Coal & Coke Company agreed to pay to the State of Utah $100 per acre for each acre of land in said paragraph described, and therefore denies the same.

5. Avers that at all times referred to in paragraph 7 of the answer of this defendant the United States of America

claimed and asserted its title to the lands in controversy and denies that it knew that the State of Utah was offering said lands for sale.

6. Replying to paragraph 8 of the defendant's answer the complainant avers that while the State of Utah was not a party to the suit referred to in paragraph 3 of plaintiff's amended bill of complaint, the fact that the lands in question were known mineral lands of the United States of America at the time of the certifications of the same to the State has been known to the State of Utah from the time of the filing of said suit and that ever since said time the State has had full knowledge of the character of the said lands.

7. Admits the allegations of paragraph 9 of the defendant's answer, but avers that the only lands which the State of Utah was authorized to select and obtain title to from plaintiff were surveyed, unappropriated, unreserved non-mineral lands (excepting saline lands which were expressly granted to the State).

[fol. 62] 8. Admits the averment of paragraph 10 of the defendant's answer except the allegation that the lands in controversy and selected by the State were charged against the State by the plaintiff and avers that such lands were not the subject of such a charge for the reason that they were known coal lands at the time of the certification and did not pass to the State by the grants contained in the Enabling Act referred to in the defendant's answer.

9. Admits that between December 10, 1900, and December, 1904, when the State selected the lands described in the Government's bill of complaint the State believed that said lands did not contain any known mineral and was innocent of the fraud through which the selection and certification of the land were procured; denies that the State believed the lands to be non-mineral ever since such time as alleged and avers that the State has had full knowledge of the character of the land since the filing of the suit referred to in paragraph 3 of the plaintiff's bill of complaint. Avers that the transactions between the defendant and the State of Utah alleged by defendant are ineffective to relieve the defendant from the effects of the fraud adju-

dicated against it in the case referred to in paragraph 3 of the plaintiff's amended bill of complaint or to enable the defendant to reap the benefits of such fraud.

10. Admits that the State of Utah and its officials believed the statements contained in the affidavits and in the application of the defendants named in the decree referred to in paragraph 3 of the amended bill of complaint and acted innocently of any fraud in making selection of the lands in controversy as alleged in paragraph 12 of this defendant's answer, but avers that the Secretary of the Interior of the United States of America was induced to approve the State's selection of the lands in question by means of false affidavits accompanying said application, determined as against this defendant to have been false and fraudulent in the first suit.

11. Denies that the title to the lands in question was transferred from the United States to the State of Utah by the certifications and that the floating grant made by the United States in the enabling act was thereby satisfied and that the lands became the subject of a charge against the State of Utah in satisfaction of the grants made in the Enabling Act as alleged in paragraph 13 of the defendant's answer, but alleges that the lands being known coal lands at the time of the certifications were not thereby transferred to the State and could not become a charge against the State of Utah diminishing the amount of land it was entitled to receive under said grant.

[fol. 63] 12. Admits that the State of Utah was not a party to and did not participate or take part in the suit referred to in paragraph 15 of the defendant's answer; avers that in said suit it was determined by the Court that defendant was a party to the fraudulent representations of the Milners and others which induced the certification of said lands to the State. Avers that the plaintiff is without knowledge of the representations alleged to have been made by a Special Assistant to the Attorney before the Lands Board of the State of Utah and therefore denies the same and avers that such representations were not made by any person having authority to bind the plaintiff.

13. Admits that the United States of America has made no demand upon the State of Utah since the bringing of this suit in 1907 to relinquish its title to the lands in question as alleged in paragraph 16 of the defendant's answer.

14. Replying to paragraph 17 of the defendant's answer, plaintiff avers that the defendant was a party to the fraud determined in the first suit to have been perpetrated upon the plaintiff and the direct beneficiary of the fraud so committed as determined in the first suit, and avers that if it entered into a contract with the State of Utah in 1920 as averred in paragraph 17 of its answer it was for the purpose of obtaining the benefits of the fraud so committed and was not in good faith and in reliance upon the certifications made by the Government to the State of Utah or believing that the State of Utah had good title to said lands and the right to dispose of the same.

15. Replying to paragraph 18 of the defendant's answer, plaintiff avers that it is without information as to the transactions between the State of Utah, the defendant Carbon County Land Company and defendant Independent Coal & Coke Company therein alleged, and therefore denies the same.

16. Admits the execution of the mortgage by the defendant to the State of Utah as alleged in paragraph 19 of defendant's answer and avers that the defendant has been ful-y advised at all times of the claim of the United States in and to the land in question.

17. Avers that it is without knowledge as to the payment of the taxes by defendant as alleged in paragraph 21 of its answer and therefore denies the same, but alleges that the [fol. 64] lands in question were not subject to taxation and the assessment of the same for taxation if made was invalid and ineffective; that any payment of such taxes that the defendant might have *been* made was not in good faith but was for the purpose of assisting it in its fraudulent purpose to acquire the lands in question.

18. Replying to paragraph 22 of defendant's answer, plaintiff avers that it has at all times asserted its title to

the lands in question against the grantees of the State of Utah, the State of Utah and all other persons whatsoever.

19. For reply to paragraph 23 of the defendant's answer the plaintiff denies that it made the representations alleged in the answer and there referred to; avers that the statute of limitations pleaded by the defendant is not a bar to this suit and that that question has been determined by the Supreme Court of the United States; avers that the remaining allegations of said paragraph are mere conclusions of the pleader to which the plaintiff is not required to reply.

All of which matters and things plaintiff will be ready to prove as the Court may direct and the plaintiff prays that the prayer of its bill of complaint be granted.

B. M. Parmenter, Assistant Attorney General. Nat M. Lacy, Special Assistant to the Attorney General. Charles M. Morris, United States Attorney.

Copy of freging reply received this 14th day of February, 1929.

Geo. P. Parker, Attorney General for State of Utah. King & King, Attorneys for Carbon County Land Co. M. E. Wilson, Attorney for Independent Coal & Coke Company.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

ANSWER OF PLAINTIFF TO COMPLAINT IN INTERVENTION OF THE STATE OF UTAH—Filed Fed. 6, 1929

Comes now the United States of America, the plaintiff herein, by its counsel acting under the authority of and at the direction of the Attorney General of the United States, and for its answer to the complaint in intervention of the State of Utah denies, admits and alleges as follows:

1. Realleges the allegations contained in its Bill of Complaint as true; that the intervening petition of the State is in effect a suit against the United States of America, and

that the United States of America has not consented to be sued.

2. Alleges that no claim can result against the State of Utah as alleged in paragraph 1 of the State's complaint in intervention because of the fraud of the State's grantees alleged in the plaintiff's Bill of Complaint and found in the suit referred to in paragraph 3 thereof.

3. Admits the allegations of paragraph 2 of the State's complaint, but avers that the only lands which the State of Utah was authorized to select and obtain title to from plaintiff were surveyed, unappropriated, unreserved non-mineral lands (exception saline lands which were expressly granted to the State).

4. Admits the averments of paragraph 3 of the State's complaint except the allegations that the lands in controversy and selected by the State were charged against the State by the Government, and avers that such lands could not be the subject of such a charge for the reason that they were known coal lands at the time of the certification and did not pass to the State by the grants contained in the Enabling Act *refer* referred to in the State's pleadings.

5. Admits that between December 10, 1900, and December, 1904, when the State selected the lands described in the Government's Bill of Complaint, the State believed that said lands did not contain any known mineral and was innocent of the fraud through which the selection and certification of the land was procured; but denies that the State has believed the land to be non-mineral ever since such time as alleged, and avers that the State has had full knowledge of the character of said land since the filing of the suit referred to in paragraph 3 of the plaintiff's Bill of Complaint.

6. Admits that the State and its officials believe the statements contained in the affidavits and in the application of the defendants named in the decree referred to in para- [fol. 66] graph 3 of the Amended Bill of Complaint and acted innocently of any fraud in making the selection of the land in controversy, but avers that the Secretary of the Interior of the United States of America was induced

to approve the State's selection of the lands in question by means of the false affidavits accompanying said affidavit upon which the Secretary relied and by which he was deceived, as hereinafter alleged; denies that the title to said lands was transferred to the State by the certification and that the floating grants were thereby discharged to the extent and in the manner alleged in paragraph 5 of the intervening Complaint, or that the State's selection of said lands and the certification of the list selected operated to partially satisfy the grant.

7. Admits that the State of Utah was not a party to and did not participate or take part in the suit referred to in paragraph 6 of the intervening Complaint of the State.

8. Avers that the plaintiff is without any knowledge of representations alleged by the State in paragraph 7 of its Bill to have been made by a Special Assistant to the Attorney General before its Lands Board. Therefore denies the same; but alleges that if such representations were made they were unauthorized and not binding upon the United States; that they were in effect no more than opinions of such Special Assistant to the Attorney General as to the legal effect of the judgment in the first suit. The plaintiff avers that it has at all times claimed and asserted its title to the lands in question.

9. The plaintiff admits the allegations of paragraph 8 of the State's Bill to the effect that the United States has at no time since the bringing of the suit in 1907 made any demand or request whatsoever of the State of Utah or its officers, boards, departments, or agents, to relinquish its title to the said lands, but denies that it has led the State by any affirmative act of its authorized representatives to rely upon the statements alleged to have been made by a Special Assistant to the Attorney General of the United States.

10. Plaintiff alleges that it is without information as to the contract between the State and the Carbon County Land Company of date January 2, 1920, and the transactions alleged in paragraph 9 of the State's Bill, and denies the same, except the execution and delivery of the State's

patent to the Carbon County Land Company and the execution and delivery of the mortgage by the Carbon County Land Company, as alleged. Plaintiff avers that such con- [fol. 67] tract, if made, was entered into with full knowledge of the State of the fraud as alleged and proven in the case referred to in paragraph 3 of the plaintiff's Bill of Complaint, and says that if any legal title has passed to the Carbon County Land Company by said transactions it has inured to the benefit of the United States. That by reason of the fraud of the Carbon County Land Company established in the former suit and the knowledge of such fraud by the State at the time, any such evidence of indebtedness executed by the Carbon County Land Company to the State of Utah as alleged is void and of no effect.

11. Avers that it is without knowledge of the contract alleged in paragraph 10 of the State's Bill between the Ind-pendent Coal & Coke Company, the Carbon County Land Company and the State. Further denies the allegations of paragraph 10 relevant thereto.

12. Plaintiff avers that it is without knowledge as to the payment of the taxes by defendant Independent Coal & Coke Company as alleged in paragraph 11 of the State's intervening complaint and the placing of the property alleged to have been purchased by the Independent Coal & Coke Company upon the assessment rolls of the State for the purpose of taxation. Therefore denies the same, but alleges that the land alleged to have been taxed was the property of the United States and was not subject to taxation and the assessment of the same if made for taxation was invalid and ineffective, and that any payment of such taxes that the defendant Independent Coal & Coke Company may have made was with full knowledge of the fraudulent manner in which the certification of the land of the State had been procured as herein alleged and of the ownership of the United States of said lands.

13. Plaintiff denies that the transactions alleged whereby the State of Utah attempted to convey title to the Carbon County Land Company in and to said land on the second day of January, 1920, and entered into the arrangement alleged in paragraph 10 of the State's Bill, if such transactions were had as in paragraph 10, alleged, were made

and done honestly and in good faith on the part of the State in the belief that it was acting within its rights, and was the true and lawful legal and equitable owner of said land, as alleged in paragraph 12 of the State's Bill, but avers that at the time of the said transaction the State well knew that the United States was the owner of said land and knew of the fraud by which the certifications of the State had been obtained as hereinafter alleged. Further [fol. 68] answering paragraph 12 — the State's Bill the plaintiff denies that the cause of action stated in the plaintiff's Bill of Complaint is barred by the provisions of section 8 of the Act of Congress of March 3, 1891; avers that the cause of action stated in the plaintiff's Bill is not one to cancel the certification of the lands to the State and avers that in any event the plaintiff's cause of action is not barred by the Statute of limitations pleaded by the State for the reason that said statute does not apply to the approval of the selection of the State and the certification of the lands selected by the Commissioner of the General Land Office and the Secretary of the Interior to the State, but applies only to patents; denies that the plaintiff is estopped from asserting the invalidity of the mortgage to the State of Utah pleaded by the State or from asserting its title to the said lands.

14. Denies that said mortgage is a valid and enforcible obligation as alleged in paragraph 13 of the State's Bill and alleges that the said mortgage was taken by the State with full knowledge of the fraud of the State's grantees as herein alleged in procuring the certification of the land to the State. Alleges that said mortgage is null and void and of no effect to vest the State of Utah with any right, title or interest in and to said land. Plaintiff further alleges that there was no valid consideration for said mortgage going from the state to the defendant executing the same for the reason that the State was without any title to the land in question and covered by said mortgage; avers that the tax deed pleaded in paragraph 13 of the State's Bill was wholly null and void, if the same was made as alleged, which the plaintiff denies because it has no knowledge of the same upon which to base a belief, for the reason that the land attempted to be taxed and so sold for taxes was at all times the property of the United States of America

and not subject to taxation by the State of Utah or any of its subdivisions.

15. Denies that the State is the owner of a first lien upon the land in question as alleged in paragraph 14 of the State's Bill, and avers that the State is without any interest whatever in the property in controversy.

16. For a further answer, defense and counterclaim to the intervening complaint of the State of Utah the plaintiff alleges that on the 1st day of January, 1900, it was the owner in fee in the possession and entitled to the possession of the land described in its Bill of Complaint, which said lands on the date hereinbefore stated were vacant and unreserved and unappropriated, and were rough and broken in character and unfit for agricultural purposes and [fol. 69] of slight if any utility for grazing purposes, but all of said lands, at said time were well known coal lands and chiefly valuable for their coal deposits and were at said time of the value of more than $100,000 on account of their valuable coal deposits.

17. Plaintiff further shows to the court that under the Act entitled 'An Act to enable the people of Utah to form a Constitution and state government and to be admitted into the Union on an equal footing with the original states' approved July 16, 1894, the State of Utah was granted by complainant upwards of one million acres of land for the establishment and maintenance of state schools, asylums, institutions, and other state purposes which lands were to be selected by the state under the direction of the Secretary of the Interior from the unappropriated, non-mineral and non-coal land of the complainant and were to be disposed of exclusively for the purposes named in said act in such manner as the legislature of the State of Utah should provide. That no mineral lands were granted to the State of Utah by said Act of Congress except saline lands.

In the year 1896 the legislature of the state created a Board of Land Commissioners which was given direction, management and control of the land granted to the state by complainant and said land board was empowered to sell the same; in accordance with the provisions of said act and the constitution of the state said board was authorized to cause all public lands granted to the state to be selected

and registered and after the board should have so selected and numbered same it became its duty to take such action as necessary to secure the approval of complainant and a final transfer to said selected lands from complainant to said state.

The plaintiff further alleges that the only lands which the State of Utah was authorized to select and obtain title to from complainant, were surveyed, unappropriated, unreserved, non-mineral lands (excepting saline lands which were expressly granted to the State of Utah), and no officer of complainant had authority to transfer the title of complainant to said state to any public lands that had been appropriated or reserved or any mineral lands, or any coal lands, or lands classified as mineral lands.

18. The plaintiff further alleges that the only way by which said land particularly described in its Bill of Complaint could be legally procured from complainant was through compliance with an act of Congress entitled "An [fol. 70] act to provide for the sale of lands of the United States containing coal," which act was approved March 3, 1873, and is in part as follows:

Every person above the age of 21 years, who is a citizen of the United States, or who has declared his intention to become such, or an association of persons, severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal land of the United States, not otherwise appropriated, or reserved by competent authority, not exceeding 160 acres to such individual person, or 320 acres to such association, upon payment to the Receiver of not less than ten dollars per acre for such lands where the same shall be situated more than 15 miles from any completed railroad and not less than $20.00 per acre for such lands as shall be within fifteen miles of such road.

Any person or association of persons, severally qualified as above provided, who have opened and improved, or shall hereafter open and improve any coal mine or mines upon public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry under the preceding section of the mines so opened and improved, provided, that when any association of not less than four

persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding 640 acres, including such mining improvements.

All claims under the preceding sections may be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by filing a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvement shall have been made prior to the expiration of three months from the 3rd day of March, 1873, sixty days from the expiration of three months shall be allowed for the filing of the declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the 3rd day of March, 1873.

The three preceding sections shall be held to authorize [fol. 71] only one entry by the same person or association of persons, and no association of persons, any member of which shall have taken the benefit of said sections, either as individuals or as a member of any other association, shall enter or hold any other lands under the provisions thereof, and no member of any association which shall have taken the benefit of such sections, shall enter or hold any of the lands under their provisions; and all persons claiming under section 2348 shall be required to p[illegible] their respective rights, and pay for the land filed upo[illegible]thin one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to any other qualified applicant.

19. Plaintiff further alleges that during the life time of Stanley B. Milner and on and prior to December 10, 1900, the said Stanley B. Milner formed and planned a scheme to obtain the title to the aforesaid coal lands without a compliance with the act of Congress aforesaid relating to coal lands and without paying the price fixed by complainant for lands chiefly valuable for coal and with the fraudulent purposes and intent to obtain said lands as cheaply as

possible and with fraudulent purpose and intent of obtaining a larger acreage of coal lands than he could otherwise obtain under said coal land laws, which scheme was formed and entered into with the fraudulent intent and purpose to defraud the United States of America out of the title to and possession and use of the aforesaid coal lands. Then said plan and scheme so formed by the said Stanley B. Milner was to be carried out in the following manner, to-wit: To induce the officers of the State of Utah, to-wit, the officers of the State Board of Land Commissioners, to select said lands as grazing lands and as agricultural lands and to induce and obtain the said officers of the said Board of Land Commissioners of the State of Utah to represent to complainant that the aforesaid lands were grazing lands and chiefly valuable for grazing and agricultural purposes, and not valuable as mineral lands, and in this way and manner to induce the said officers of said State Board of Land Commissioners to select said lands under the aforesaid grant of lands made to the State of Utah in said Enabling Act admitting Utah into the Union and to have said lands listed and certified to the said State of Utah as non-mineral lands and to induce the said officers of the said State Board of Land Commissioners to sell the said lands to the said Stanley B. Milner and to other persons selected [fol. 72] by him to purchase said lands for and in his behalf at a cheap price and on long-time payments.

20. Plaintiff further alleges that in pursuance of said fraudulent scheme and plan formed by the said Stanley B. Milner to obtain the aforesaid described lands as non-mineral lands, the said Stanley B. Milner, during his life time, and on or about December 10, 1900, filed an affidavit and an application with the State Board of Land Commissioners of the State of Utah, to purchase the followed portion of said described lands, to-wit:

Northwest quarter (¼) and south-east quarter (¼) Section twenty-two (22); east half ½ section twenty-seven (27); south half ½ Section thirty-three (33); all of section thirty-four (34); south half ½ Section thirty-five (35), Township twelve (12) south, range eleven (11) east, Salt Lake Meridian, 1920 acres; and

That in making said application for the purchase of said lands, the said Stanley B. Milner was required by

the said State Board of Land Commissioners of the said State of Utah to enter into and did enter into an agreement for the purchase of said lands, which agreement so made and entered into between the said Stanley B. Milner and the said State of Utah, contained among other things the following express provisions: "That if said lands shall hereafter be determined to be mineral in character, or if any person, other than the State, shall be determined to have a superior right or claim to said land, then, in either of said events, the State of Utah shall be released from all obligations under this agreement." And it is further stated in said agreement that said lands were grazing lands, that said agreement was in the form of an affidavit and was subscribed and sworn to by said Stanley B. Milner; and attached to said agreement, and made a part of the same, was the following affidavit:

STATE OF UTAH,
County of Salt Lake, ss:

"Stanley B. Milner, being duly sworn according to law, deposes and says; that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described lands, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, [fol. 73] within the limits thereof, any vein of lode of quartz or other rock in place bearing gold, silver cinnabar, lead, time or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, gilsonite, elaterite, asphaltum, or other valuable mineral deposit, that the land contains no salt springs or deposit of salt in any form sufficient to render it valuable therefore; that no portion of said land is claimed for mining purposes, under the local customs and rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is now made for the purpose of frau-

dulently obtaining title to mineral lands, but with the object of securing land for agricultural purposes.

"That the land is not occupied and improved by an Indian";

which affidavit was subscribed and sworn to by the said Stanley B. Milner as a part of his application to purchase the aforesaid lands; that at the time of making the aforesaid agreement, application to purchase and affidavit, as aforesaid, the said Stanley B. Milner, well knew that said lands were chiefly valuable for the coal deposits therein, and the said agreement, application and affidavit, as aforesaid was false and fraudulent as hereinafter shown, and was fraudulently made for the express purpose of obtaining title to coal lands, and not for the purpose of securing said land for agricultural purposes, or for grazing purposes.

21. And the Plaintiff further shows to the court that for the same fraudulent purpose and intent as hereinbefore stated, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, on or abont April 1st, 1901, filed a similar application and agreement and affidavit with the State Board of Land Commissioners to purchase the following described tract of land, to-wit:

North half (½) Section twenty-six (26) Township twelve (12) south, Range eleven (11) east, Salt Lake Meridian, 320 Acres; and

That said application, agreement and affidavit was in the same form as that heretofore mentioned as having been made by the said Stanley B. Milner for himself, and was subscribed and sworn to by the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, and said affidavit was false and fraudulent in the particulars as hereinafter [fol. 74] shown, and was made with the fraudulent purpose and intent of obtaining title to said coal lands, and not for the purpose of securing said lands for agricultural purposes, and plaintiff alleges that said lands were a portion of the lands described in Plaintiff's Bill of Complaint herein, and were well known coal lands and chiefly valuable for the coal deposits therein.

22. That on or about March 29, 1902, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, filed a

like application, agreement and affidavit for the purchase of the following described lands, to-wit:

North half (½) section thirty-three (33); Township twelve (12) south, range eleven (11) east; Lots one (1), two (2) three (3) and southeast quarter (¼) of south-east quarter (¼) section three (3), Township thirteen (13) south range eleven (11) east, Salt Lake Meridian. 477.04 acres; and

That said affidavit and agreement was false and fraudulent in the particulars hereinafter shown, and was made with the fraudulent purpose and intent of obtaining title to coal lands and not with the object of securing said lands for agricultural or grazing purposes; that said lands are chiefly valuable for the coal deposits therein, and were at said time well known coal lands, and are a portion of the lands described in Plaintiff's Bill of Complaint herein.

23. That Stanley B. Milner, on or about March 17, 1903, made an application, agreement and affidavit in a like form as heretofore alleged, as the agent of Harley O. Milner, of Milner, Idaho, to purchase the following described lands, to-wit:

All of sections one (1) and three (3); north half (½) section ten (10); north half (½) section eleven (11); north half (½) section twelve (12), township thirteen (13) south, range ten (10) east, Salt Lake Meridian, 2244.24 acres, which lands were a part of the lands first above described, and

That the affidavit, application and agreement was in the same form as heretofore alleged, and said agreement and affidavit was false and fraudulent in the particulars as hereinafter shown, and was made with the fraudulent purpose and intent to obtain title to coal lands, and not with the object of securing said lands for agricultural or grazing purposes; and that said lands were purchased for the use and benefit of the said Stanley B. Milner; and not for the use and benefit of the said Harley O. Milner; and that the said Stanley B. Milner furnished the money to purchase [fol. 75] said lands from said State of Utah, and with the understanding and agreement with the said Harley O. Mil-

ner that when the title thereto should be obtained from the said State of Utah that the said land should be transferred to the said Stanley B. Milner, or to some corporation, the capital stock of which was owned by the said Stanley B. Milner.

24. That on or about September 14, 1903, the said Stanley B. Milner, in further pursuance of said scheme to defraud the United States, did persuade and induce one Samuel H. Gilson to file an application and obtain an agreement to purchase from the said State of Utah the following described lands:

The south-east quarter (¼) of section twelve (12); the east half (½) of the north-east quarter (¼) of section fourteen (14), township thirteen (13) south, range ten (10) east; Lot one (1); the north-east quarter (¼); the north-east quarter (¼) of the north-west quarter (¼); the north half (½) of the south-east quarter (¼); the south-east quarter (¼) of the south-east quarter (¼) of section seven (7), in township thirteen should, range eleven (11) east, Salt Lake Meridian, containing 603 acres;

which lands are a portion of the lands in plaintiff's Bill of Complaint; that said application, agreement and affidavit was in the form heretofore alleged, and which affidavit was subscribed and sworn to by the said Samuel H. Gilson for the fraudulent purpose of obtaining title to coal lands, and not with the object of securing said lands for agricultural purposes, and which affidavit and agreement was false and fraudulent in the particulars as hereinafter shown, and was known to be false and fraudulent by said Samuel H. Gilson at the time said affidavit was sworn to by said Gilson.

25. That prior to the making of said agreements, affidavits and applications to purchase said lands from said State of Utah, through the said State Board of Land Commissioners, the said Stanley B. Milner had employed expert geologists and engineers to make an examination of the lands above described, and he himself, with the aid and assistance of Samuel H. Gilson, who was a man of large experience in the selecting of coal lands, had thoroughly examined each subdivision of the aforesaid lands, and said Milner and said Gilson had discovered that said lands were

underlaid with vast deposits of valuable coal, and that all of the aforesaid lands were chiefly valuable for the coal deposits contained therein, and were of little or no value [fol. 76] for any other purpose, and so knowing he determined and planned to obtain the title and possession of said coal lands, with the aid and assistance of said Truth A. Milner, Harley O. Milner, and the said Samuel H. Gilson, with the purpose and intent of cheating and defrauding the United States; and in pursuance of said fraudulent intent and purpose to defraud the United States out of the title and possession of the aforesaid lands, the said Stanley B. Milner, and the said Samuel H. Gilson made the aforesaid affidavits well knowing at said time that the same were false and fraudulent in this: That the said lands did contain large deposits of coal, and that said lands were essentially mineral lands, and that said lands were not essentially non-mineral lands, etc., as stated in said affidavits, and that the said application to purchase the lands by the said Samuel H. Gilson aforesaid, was made for the use and benefit of the said Stanley B. Milner, and not for the said Samuel H. Gilson, and the money to purchase the same was furnished by the said Stanley N. Milner, and not by the said Samuel H. Gilson; and both said Stanley N. Milner and the said Samuel H. Gilson well knew at the time that all of said lands were applied for to the State of Utah that the same were well known coal lands, chiefly valuable for the deposits of coal therein, and were not either grazing or agricultural lands.

26. That the said State Board of Land Commissioners did not in fact make such examination, or any investigation as to the character of said lands to determine whether the same were mineral, or coal lands, or non-mineral and non-coal lands, nor as to whether said lands were or were not grazing or agricultural lands, and did not do this, either as a collective body, or by one or more of its members or officers, or its agents, or agent, or by means of any person or persons employed or procured by it as agents for such purpose, but, on the contrary, acted solely on the representation of the said Stanley B. Milner and said Samuel H. Gilson, as aforesaid, to procure said lands for it, which representations, in the cases hereinbefore set forth and concerned herein, were not only interested and biased, but false and fraudulent in these essential particulars; that the

said Stanley B. Milner, Truth A. Milner, Harley M. Milner and said Samuel H. Gilson, did not seek to obtain said lands for either grazing or agricultural purposes, as they represented, as aforesaid, but did seek to obtain said lands for coal mines; and also, in that the aforesaid persons represented that they were not mineral or coal lands, when in fact said lands were mineral coal lands, and were sought to be obtained by the aforesaid parties for the certainty that they were lands.

[fol. 77] As the result of said false and fraudulent representations said State Board of Land Commissioners were induced to and did enter into contracts of writing with said applicants, and that upon compliance with certain conditions, not material or necessary herein to be set forth, said State Board of Land Commissioners would select the lands applied for, and when the State of Utah should have obtained title to the same, would sell to said applicants said land, at private sale, for the sum of $1.50 per acre, or thereabouts.

That said State Board of Land Commissioners appointed its President and Secretary as its agents to attend to the details of its business, and to investipate the lands involved in said applications to purchase, as well as to obtain certain certified selections from complainants of lands provided for by the grant aforementioned, and so it was, that said President and Secretary, in the supposed performance of duties, appointed the applicants as aforesaid as agents of said Board, to examine and investigate as to the character of the lands; whereupon said Stanley B. Milner and Samuel H. Gilson duly reported that they had investigated and found said lands to be non-mineral and non-coal and chiefly valuable for agricultural purposes.

Plaintiff further shows, that at the time when said several applications were made, it was a known rule of complainant's General Land Office, that no Register or Receiver of any Land Office in the mineral States would accept an entry of non-mineral land, unless accompanied by a non-mineral affidavit based upon the personal knowledge of the entryman, and this rule applied in full force to selections when made by the State of Utah, under the grant to it by said Act of Congress. But, notwithstanding said known rule, said State Board of Land Commissioners of the State of Utah, by its President and Secretary, as selecting agents,

did not comply with the same, as appears from the several affidavits accompanying the several lists in which the aforesaid lands are included. And avers that the only affidavits furnished by the said State Board of Land Commissioners to said Register and Receiver, accompanying said lists respectively, was on- in each case, in effect and practically the same in all cases, because a printed form was made use of, which was in substance and effect as follows:

"STATE OF UTAH,
County of Salt Lake, ss:

"We, ——, authorized agents of the State Board of Land Commissioners of the State of Utah, being first duly sworn, depose and say: That the foregoing list of [fol. 78] lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under section — of an Act of Congress entitled: 'An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the union on a footing with the original States,' approved July 16th, 1894. That all of said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands and are of a character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employes of the State, as to their mineral or agricultural character; that there is not to our knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land to our knowledge any placer, cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposits; that the land contains no salt springs or deposit of salt in any form sufficient to render it valuable therefor; that no portion of said lands is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for minerals during any part of the year by any person or persons; that said land is essentially non-mineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral lands, but with the object of securing said land for agricultural purposes; and the above and foregoing statements as to the character of said land applied to each and every legal sub-division

thereof. That the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named."

These so-called affidavits were in each case subscribed by the President and Secretary, as agents for the said State Board of Land Commissioners, and were sworn to by said officers before a Notary Public.

Plaintiff further avers that the Register and Receiver of complainant's Land Office at Salt Lake City, within whose district the lands herein concerned are situated, received from the said State Board the lists containing descriptions of lands involved herein, and forwarded them, as was their duty, to the Commissioner of Complainant's General Land Office, but so it was, that the officials and [fol. 79] employes of the said General Land Office were unduly impressed by the fact that the State of Utah was applicant for such lands, and had no knowledge or suspicion that said President and Secretary, acting as agents of the State Board, had contracted to sell said lands in advance, and did not know no employee or agent of the State of Utah had investigated and examined said lands, and that said examination, if any was made, had been entrusted to the very persons who had been procured to defraud complainant of its lands in the interests of other persons, and that whatever action said persons did take was for the purpose of defrauding and falsely representing to said State Board the character and condition of said lands, to enable said State Board to have some foundation of fact upon which to base their direct, positive and unequivocal assertions on oath, that the State of Utah, being so impressive in its functions, as applicant for portions of the land granted by Congress for beneficial purposes to said State, the officers and employes of said General Land Office were led to believe in the regularity, honesty and good faith of said State, and to overlook the fact that upon the face of each and every of said printed, sworn statements it was made certain that the affiants had no personal knowledge of that which they positively asserted, and no knowledge which gave force to that asserted in negative form, and that as a showing for the certification said statements had no legal force or efficiency whatever, and contain nothing upon which the mind of the Commissioner of the Gen-

eral Land Office could act, or his judgment could be founded in attempting to determine whether in fact said lands were mineral or non-mineral, coal or non-coal, and hence plaintiff avers, that whatever action said Commissioner did take in certifying said lands to said State was without jurisdiction and wholly void, and did not avail to pass title from complainant to the State of Utah to the lands herein concerned.

27. Plaintiff further alleges that the said officers and agents of said State Board of Land Commissioners being thus deceived by the false affidavits of said applicants and having no other information as to the character of said lands, and relying entirely upon the statement made in the said affidavits of said applicants, and not knowing the same to be false and fraudulent, did make the non-mineral affidavit and the affidavit that said lands did not contain any deposits of coal, as set out in full herein, and did file their said affidavit attached to the lists of lands selected by the State of Utah, which are the same lands as described herein, and filed the said affidavit as aforesaid with the said [fol. 80] Register and Receiver of the Land Office at Salt Lake City, Utah; that the Register and Receiver of complainant's Land Office at Salt Lake City, Utah, were each deceived by the aforesaid affidavits of the agents of the State Board of Land Commissioners, as aforesaid, and having no evidence as to the character of said lands did rely entirely upon the affidavits aforesaid of said agents for the State Board of Land Commissioners of the State of Utah, and the said Register and Receiver of said Land Office did certify to the Commissioner of the General Land Office among other things that "the same are not, nor is any part thereof returned and denominated as mineral lands" and did allow and approve said lists of said lands made by said State of Utah, on account of the evidence contained in the affidavit of said President and Secretary of said State Board of Land Commissioners of the State of Utah as agents therefor; and the said Register and Receiver did forward the said affidavits with lists of said lands together with their certificate of allowance and approval, based upon the false evidence aforesaid, to the Commissioner of complainant's General Land Office at Washington, D. C.; and the said Commissioner of the Gen-

eral Land Office of complainant in passing upon the character of the lands mentioned in said lists relied entirely upon the statements made in said affidavits of the agents of said State Board of Land Commissioners that said lands were essentially non-mineral in character and contained no deposits of coal, and the Certificate of the Register and Receiver of the said land office, which was attached to said lists approving the same, and had no other knowledge of the character of said lands; and the said Commissioner of complainant's General Land Office was thereby deceived as to the character of said lands and not knowing that said lands were coal lands, certified all of said lands described herein to the said State of Utah, as being lands of the character contemplated in said grant, when in fact said lands were not of the character contemplated by the said Grant; that had it been known by the said Register and Receiver of the Land Office at Salt Lake City, Utah, or said Commissioner of complainant's Land Office that said lands were coal lands and chiefly valuable for the coal deposits contained therein, said lists would not have been allowed and approved, nor so certified by said Commissioner of complainant's General Land Office to the State of Utah.

That the foregoing contains all the evidence that was before the Register and Receiver of the Land Office of Salt Lake City, Utah, and all the evidence that was before [fol. 81] the Commissioner of the General Land Office as to the character of said lands, so listed and certified to said State of Utah and described herein.

28. Plaintiff further alleges that the Congress of the United States passed an Act which was approved August 3, 1854, R. S. Section 2449, which has ever since been, and is now, in force, providing as follows:

"Where lands have been, or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee simple title to the lands, or require patents to be issued therefor, the lists of such lands which have been, or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals, or records, shall be regarded as conveying the fee simple of all the lands embraced in such

lists, that are of the character contemplated by such Act of Congress, and intended to be granted thereby; and where lands embraced in such lists are not of the character embraced by such Act of Congress, and are not intended to be granted thereby, the list, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

And further shows that in obedience to said law it became and was the duty of the then Commissioner for the want of proof that the lands named and described in said lists of selections, were of the character contemplated by said Acts of Congress, to withhold his certificate, and return them to the local land officers of complainant, but either through (inadvertence), mistake, clear error of law, or deception as to the character of said lands as aforesaid, said Commissioner did approve said lists, and under his hand and seal did endorse his certificate thereon.

29. Plaintiff avers that neither in equity and good conscience, nor in law, were the said lists of lands, although so certified, available to convey any right, title, claim or interest, from complainant to the State of Utah, to any of the lands herein concerned, because the State of Utah, while not as a Government, or a collective body so intending was, by and through the failure of certain of its officers and agents to safeguard its interests as hereinbefore described, made to appear as an active party to a gross fraud [fol. 82] upon complainant in a matter in which the complainant had been bestowing a gift or grant to said State, and had been made the most potential factor in such fraud, and because the Commissioner of complainant's General Land Office acquired no jurisdiction to act upon such State's application to have said lists so certified by reason of the terms of the Act of Congress above set forth, and because the officials of complainant, the Register and Receiver of the said Land Office and the Commissioner of the General Land Office were each deceived by the false affidavits aforesaid.

30. Plaintiff further alleges that the application for the land first applied for by Stanley B. Milner, on December 10, 1900, as above described, was approved by the State of Utah on December 17, 1900; and said land was selected by

said State and said selection approved by the United States Land Office of the District of Utah on December 18, 1900, and certified to the State of Utah by the General Land Office on June 22, 1901; the price agreed to be paid was $1.50 per acre, or a total consideration of $2880.00, payable in ten annual payments;

That the application for the land applied for by Truth A. Milner, by Stanley B. Milner, her agent, in application dated April 19, 1901, above described, was approved by the State of Utah April 22, 1901; and selected by said State, which selection was approved by the United States Land Office at Salt Lake City, Utah, April 29, 1901, and certified to the State of Utah by the General Land Office December 23, 1901. That the price agreed to be paid the State therefore was $1.50 per acre, or a total consideration of $480.00 to be paid in ten annual payments.

That the second application for the land therein described applied for by Truth A. Milner, through her agent, Stanley B. Milner, as aforesaid, was approved by the State of Utah April 2, 1902; said land was selected by the State of Utah, which selection was approved by the United States Land Office at Salt Lake City, Utah, April 7, 1902, and certified to the State of Utah by the General Land Office July 9, 1903. The price agreed to be paid was $1.50 per acre, and to be paid in ten annual payments.

That the application for land applied for by Harley O. Milner by his agent, Stanley B. Milner, above described, was approved by the State of Utah March 24, 1903; said land was selected by the State of Utah, which selection was ap- [fol. 83] proved by the United States Land Office May 9, 1904. The price agreed to be paid the State therefor was $1.50 per acre, or a total consideration of $3366.36, to be paid in ten annual payments.

That the application for the land applied for by Samuel H. Gilson, as aforesaid, was approved by the State of Utah, December 15, 1903; said land was selected by the State of Utah which selection was approved by the United States Land Office at Salt Lake City, Utah, September 17, 1903, and certified to the State of Utah, by the General Land Office December 1, 1904. The price agreed to be paid the State therefor was $1.50 an acre, or a total consideration of $904.50, to be paid in ten annual payments.

That the State Board of Land Commissioners of the State of Utah entered into said contracts to sell all of said described lands to the said Milners and the said Gilson, and incorporated the description of said lands in the lists prepared for lands granted to the State of Utah by said Act of Congress of July 16, 1894, and thereafter said Commissioner of the General Land Office approved the said lists submitted by the said State of Utah containing the above descriptions, and thereafter certified said lands, with other lands, to the State of Utah.

31. Plaintiff alleges that no patents from State of Utah to said persons have ever been issued for any of said lands, but payments, as required under said contracts were made as therein provided, and said lands were afterwards patented to the Carbon County Land Company.

32. Plaintiff further alleges that as a part of the scheme to fraudulently obtain said above described coal lands, the said Stanley B. Milner, in his life time, caused to be organized, under the laws of the State of Utah, a corporation known as and called the Carbon County Land Company, which corporation was duly organized as aforesaid, under the laws of the State of Utah, and all of the stock of which was owned by the said Stanley B. Milner at the time of his death, except an insignificant number of shares given to persons solely for the purpose of enabling said corporation to be formed, and that as a part of the scheme to defraud the complainant as aforesaid, all of the aforesaid agreements to purchase the lands aforesaid from the State of Utah were assigned and transferred to the said Carbon County Land Company.

That all the payments that have been made by the said [fol. 84] Milners and the said Gilson, on the said contracts, were all made with the moneys furnished by the said Stanley B. Milner, during his life time, or some one acting for him and in his behalf, or by his estate since his death; that the sole purpose and intent of said defendants, in making said applications to purchase said lands and said agreements, was to acquire the title and possession of said lands in the interest of and for the benefit of the said Stanley B. Milner, and in pursuance of said understanding and agreement, said assignments and transfers of said contracts were made to the said Carbon County Land Company, all

of the stock of which was owned by Truth A. Milner, as the sole legatee of the said last Will and Testament of said Stanley B. Milner, deceased, excepting a few shares to enable other persons to qualify as officers and directors of said Carbon County Land Company.

33. Plaintiff further avers that when the State of Utah issued its patent and delivered the same to the Carbon County Land Company, as alleged in paragraph 9 of its petition of intervention, it had full knowledge and notice of all of the facts and circumstances hereinbefore alleged and of the suit and judgment referred to in the third paragraph of the plaintiff's Bill of Complaint.

Wherefore the plaintiff prays:

First. That the court adjudge and decree that whatever title in and to said lands passed to the State by the aforesaid certifications and was in turn by the State passed to the assignors of the defendant Carbon County Land Company through the contracts and assignments hereinbefore pleaded and against which the title of the plaintiff was quieted in the first suit, as alleged in paragraph 3 of the Bill of Complaint, and by the patent of the State of Utah to the Carbon County Land Company, emured and does emure to the benefit of and vests in plaintiff; that the mortgage executed by the Carbon County Land Company to the State of Utah, the tax deed pleased by the State and alleged lien for taxes levied by the State be cancelled, and the title of the United States of America in and to said lands be quieted against all claims and demands of the State of Utah, and that the State of Utah be restrained and enjoined from hereafter setting up any claim of title or interest in and to said lands or any part thereof;

Second. That in the alternative and in the event that the court does not by its decree adjudge, determine and [fol. 85] declare as against the State of Utah that whatever title passed to the State of Utah by the certifications of the lists selected in and to said lands has vested in the State's grantees for the use and benefit of the United States, that the certification of said land so made to the State of Utah as hereinbefore pleaded and set out be delivered up to be cancelled and that the court by its decree cancel and annul the same, and by its decree cancel and annul the patent so

issued by the State of Utah to the Carbon County Land Company as hereinbefore alleged.

Third. That the plaintiff have such other, further and different relief in the premises as may be agreeable to equity and good conscience, and its costs incurred herein.

B. M. Parmenter, Assistant Attorney General. Nat M. Lacy, Special Assistant to the Attorney General. Charles M. Morris, United States Attorney.

Duly sworn to by Nat M. Lacy. Jurat omitted in printing.

[fol. 86] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER OF INDEPENDENT COAL & COKE COMPANY—Filed April 6, 1929

And now comes the Independent Coal & Coke Company, and by leave of Court first had and obtained, amends its answer by adding thereto the following allegation as an affirmative defense to the complaint of the plaintiff, alleging as follows, to wit:

And the defendant further says that the judgment or decree pleaded in the complaint in that certain action between the United States of America and Truth A. Milner and the Carbon County Land Company, et al., was made and entered in the United States District Court for the District of Utah on June 8, 1914, and was affirmed on appeal by the Circuit Court of Appeals November 15, 1915, and that the present suit was not brought until May 16, 1924, and that if the present suit is to be treated by the Court as an action to enforce the judgment made and entered as aforesaid, then said action to enforce said judgment is barred by that certain Statute of Limitations of the State of Utah, to wit: Section 6465, which substance and effect provides that any action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, *or of any state or terri-*

tory within the United States, shall be barred after eight years from the time of entry.

M. E. Wilson, Attorney for Independent Coal & Coke Company.

Received copy of foregoing amendment to Answer Independent Coal & Coke Co., this 6th day of April, 1929.

C. R. Hollingsworth, U. S. Atty. B. C. Rinehardt.

[File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT

AMENDMENT TO ANSWER OF CARBON COUNTY LAND COMPANY

And now comes the Carbon County Land Company, and by leave of Court first had and obtained, amends its answer by adding thereto the following allegation as an affirmative defense to the complaint of the plaintiff, alleging as follows, to wit:

And the defendant further says that the judgment or decree pleaded in the complaint in that certain action between the United States of America and Truth A. Milner and the Carbon County Land Company, et al., was made and entered in the United States District Court for the District of Utah on June 8, 1914, and was affirmed on appeal by the Circuit Court of Appeals November 15, 1915, and that the present suit was not brought until May 16, 1924, and that if the present suit is to be treated by the Court as an action to enforce the judgment made and entered as aforesaid, then said action to enforce said judgment is barred by that certain Statute of Limitations of the State of Utah, to wit: Section 6465, which in substance and effect provides that any action upon a judgment or decree of any court of the United States, or of any State or territory within the United States, shall be barred after eight years from the time of entry.

King & King, Attorneys for Carbon County Land Company.

Received copy April 8, 1928.

C. R. Hollingsworth, U. S. Atty.

In United States District Court

Reply of State of Utah to Counterclaim of Plaintiff—Filed April 6, 1929.

And now comes the State of Utah, by its Attorney General, and replies to the Counter-claim of the United States filed in this action against the State of Utah, and replying to said counter-claim said State of Utah admits, alleges and denies as follows, to wit:

1. The said State of Utah reaffirms and alleges by reference each and every allegation contained in its complaint in Intervention, and makes said complaint in Intervention a part of this reply by reference.

2. The said State of Utah denies that the United States of America has at this time, or that it had at the time of the [fol. 88] commencement of this action on May 16, 1924, any interest whatsoever, either equitable or legal in any part of the lands described in the complaint of the United States of America; and the said State of Utah further denies that said lands had been adjudicated to be mineral lands in any proceeding or action wherein the said State of Utah, or any person, either by privity or otherwise representing the State of Utah was a party; and it further denies that said lands were on May 9, 1904, or at any time prior thereto, known to contain coal in commercial quantities, or that said lands were known to be chiefly valuable for the coal contained therein.

It further denies that the known mineral character of said lands was ever asserted by the United States of America until the commencement of that certain action wherein the United States of America was plaintiff and Truth A. Milner et al., were defendants, which action was commenced on January 8, 1907.

And the said State of Utah further affirmatively alleges that the United States of America at all times prior to May 9, 1904, and for more than one year thereafter, treated the said lands described in said complaint as non-mineral lands, and that it classified said lands as non-mineral in the Surveyor General's Office for the District of Utah and in the United States Land Office for the District of Utah; that it never at any time until the commencement of the action on

January 8, 1907, pretended or claimed that said lands were of a known mineral character.

And the said State of Utah further alleges that said cause of action set forth in the counter-claim of the United States of America is barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which in substance provides that all actions to vacate or annul patents shall be commenced within six years after the date of the issue of such patents, and that said action, if treated as an action to enforce a judgment, is barred by reason of the provisions of the Statute of the State of Utah, to wit: Section 6465, which in substance provides that all actions upon any judgment of any court of the United States or of any State, is barred after eight years from date of entry.

And the State of Utah further alleges as a defense to the allegations contained in the counter-claim of the United States that said United States is equitably estopped from asserting any claim or interest in or to said lands as against the State of Utah because of the matters and things alleges in the complaint in intervention of the State of Utah which [fol. 89] matters and things are made a part of this reply by reference.

Wherefore, having fully replied to the counter-claim of the United States, the State of Utah prays that the United States take nothing by reason of said Counter-claim, and that said counter-claim be dismissed for want of equity; and further prays that the lands described in said counter-claim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States.

And the said State of Utah further prays for all proper and general relief.

George P. Parker, Attorney General of the State of Utah.

Copy received and service acknowledged this 6th day of April, A. D. 1929.

C. R. Hollingsworth, Attorney for Plaintiff, United States of America.

[File endorsement omitted.]

In United States District Court

Judgment and Decree—Filed June 11, 1929

This cause came on to be heard at this term, the United States of America, plaintiff appearing by Mr. Nat M. Lacy, Special Assistant to the Attorney General of the United States and Mr. C. R. Hollingsworth, District Attorney for the United States for the District of Utah, and the Carbon County Land Company appearing by its attorney, Mr. Samuel A. King, and the Independent Coal & Coke Company appearing by its attorney, Mr. M. E. Wilson, and the State of Utah appearing by its Attorney General, Mr. George P. Parker, and the cause having been submitted to the Court for decision on the evidence taken on the first, second and third days of April, A. D. 1929, and the same having been argued by counsel and the Court being now fully advised in the premises,

It is therefore ordered, adjudged and decreed as follows, to wit:

1. That the State of Utah, intervenor herein, is, as [fol. 90] against the plaintiff, The United States of America, the owner and entitled to the possession of the following described property:

Northwest quarter and southeast quarter of Section 22; east half of Section 27; south half of Section 33; all of Section 34; south half of Section 35, Township 12 South, Range 11 East, Salt Lake Meridian, containing 1920 acres.

North half of Section 26, Township 12 South, Range 11 East, Salt Lake Meridian, containing 320 acres.

North half of Section 33, Township 12 South, Range 11 East; Lots 1, 2, 3 and the southeast quarter of the southeast quarter of Section 3, Township 13 South, Range 11 East, Salt Lake Meridian, containing 477.04 acres.

All of Section 1 and 3; north half of Section 10; north half of Section 11; north half of Section 12, Township 13 South, Range 10 East, Salt Lake Meridian, containing 2244.24 acres.

Southeast quarter of Section 12; east half of the northeast quarter of Section 14; Township 13 South, Range 10

East; Lot 1, northeast quarter; northeast quarter of the northwest quarter; north half of the southeast quarter; southeast quarter of the southeast quarter of Section 7, Township 13 South, Range 11 East, Salt Lake Meridian, containing 603 acres, making a total amount of 5564.28 acres; all situated in the county of Carbon, State of Utah.

2. That the title of the State of Utah to the said described lands be and the same is hereby quieted as against any and all claims of the United States of America, or any person or persons claiming through or under said United States of America; and the said United States of America has no right, title or interest or right of possession in or to the premises above described or any part thereof, and that whatever claim the United States of America ever had, if any, against the State of Utah for said lands, or any part thereof, to set aside the certifications of said land by the United States of America to the State of Utah is hereby adjudged to have been barred prior to the commencement of this action by Section 8 of the Act of Congress of March 3, 1891.

3. And it is further ordered, adjudged and decreed that the State Patent dated February 10, 1920, issued by the State of Utah to the Carbon County Land Company be and the same is hereby adjudged to be void and of no effect.

4. And it is further ordered, adjudged and decreed that this decree shall not have the effect of adjudicating or determining any rights or liabilities as between the inter-[fol. 91] venor, The State of Utah, and the defendant, Independent Coal & Coke Company.

Done in open Court this eleventh day of June, A. D. 1929.

Tillman D. Johnson, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S PETITION FOR APPEAL—Filed Sept. 6, 1929

The plaintiff above named feeling itself aggrieved by the judgment and decree made and entered on the 11th day of June, 1929, in the above entitled cause; does hereby ap-

peal from said judgment and decree to the United States Circuit Court of Appeals for the Tenth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the records, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Tenth Circuit, and that such other proceedings may be had as may be proper in the premises.

C. R. Hollingsworth, United States Attorney.
George N. Lunt, Assistant United States Attorney.

Received a copy of the above and foregoing Petition for Appeal this 6th day of September, 1929.

King & King, Attorneys for Carbon County Land Co. M. E. Wilson, Attorney for Independent Coal & Coke Co. George P. Parker, Attorney General for Intervenor, State of Utah; N. C. Jensen, Assistant United States Attorney, Solicitors for the Plaintiff.

[File endorsement omitted.]

[fol. 92] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Sept. 6, 1929

Upon considering the Petition for appeal by the above named plaintiff this day presented, and good cause appearing therefor,

It is hereby ordered, that an appeal be allowed to the petitioner, the plaintiff above named, in the above entitled cause, from the judgment and decree made and entered on the 11th day of June 1929, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the Tenth Circuit, and that the transcript of the record, proceedings and papers upon which said judgment and decree were based, duly authenticated, be filed in the United States Circuit Court of Appeals for the Tenth Circuit according to law and the rule of said United States Circuit Court of Appeals.

Dated this 6th day of September, A. D. 1929.

(Signed) Tillman D. Johnson, Judge.

Received a copy of the above and foregoing Order Allowing Appeal, this 6th day of September, 1929.

Samuel A. King & Creighton G. King, Attorneys for Carbon County Land Company. M. E. Wilson, Attorney for Independent Coal & Coke Co. Geo. P. Parker, Attorney General, Attorney for State of Utah, Intervenor.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S ASSIGNMENT OF ERRORS—Filed Sept. 6, 1929

Comes now the plaintiff by its solicitors and says, that in making and entering the judgment and decree herein on June 11, 1929, the Court erred in the following particulars:

1. The court erred in adjudging the intervenor, the State of Utah, to be the owner of and entitled to the possession of land described in plaintiff's bill, and in the court's decree as against the United States of America.

[fol. 93] 2. The court erred in holding and adjudging that whatever claim the United States of America ever had against the State of Utah for the lands in question to set aside the certification of the same by the United States to the State of Utah was barred prior to the commencement of this action by Section 8 of the Act of Congress of March 3, 1891.

3. The court erred in making an order permitting the State of Utah to intervene and file its intervening petition over the opposition and objection of the plaintiff, the petition of intervention being in effect a suit against the United States and the United States not having consented to be sued, and the intervention not being in subordination to and in recognition of the propriety of the main proceedings.

4. The court erred in holding that it had jurisdiction of the case, upon the complaint in intervention of the State of Utah, because exclusive original jurisdiction of such an

action wherein a State is a party to the suit is vested in the Supreme Court of the United States.

5. The court erred in overruling the motion of the plaintiff to strike out the complaint in intervention of the State of Utah because the court was without jurisdiction to entertain the affirmative defense and counterclaim pleaded by the State and had no jurisdiction to make the State a party and adjudicate the issues between the United States of America and the State of Utah.

6. The court erred in failing to adjudge and decree the defendants, the Carbon County Land Company, and Independent Coal and Coke Company to be Trustees for the United States of such title as the Carbon County Land Company acquired in the lands in question by a patent to it from the State of Utah, and in failing to adjudge and decree such title so derived by and through said patent to inure to the United States and vest in the plaintiff, and in failing to restrain and enjoin said defendants from hereafter setting up any claim or title to said lands, as prayed in plaintiff's Bill of Complaint.

Wherefore the plaintiff prays that said judgment and decree be reversed and that the District Court of the United States for the District of Utah be directed to vacate and set aside its said judgment and decree made and entered herein on the 11th day of June, 1929, and thereupon enter its judgment and decree as prayed in its Amended Bill of Complaint, and in its Answer to the Complaint in Intervention of the State of Utah, and for each other and fur-
[fol. 94] ther relief as it may be entitled to in equity and good conscience.

C. R. Hollingsworth, United States Attorney; George H. Lunt, Assistant United States Attorney; E. C. Jensen, Assistant United States Attorney, Solicitors for Plaintiff.

Received copy of the above and foregoing Assignment of Errors this 6th day of September, A. D. 1929.

Samuel A. King and Creighton G. King, Attorneys for Carbon County Land Company. M. E. Wilson, Attorney for Independent Coal & Coke Co. George P. Parker, Attorney General, Attorney for State of Utah, Intervenor.

NOTE RE CITATION

(Citation in proper form, directed to appellees and to intervener, was issued on Sept. 6, 1929, and on the same day service of said citation was accepted by counsel for said appellees and for said intervener.)

(Omitted: Order of Aug. 31, 1929; order of Sept. 27, 1929, and order of Oct. 30, 1929, all enlarging time in which to settle Statement of Evidence; order of Sept. 27, 1929, and order of Oct. 26, 1929, both enlarging time in which to file transcript on apeal.)

IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME IN WHICH TO SETTLE STATEMENT OF EVIDENCE AND FILE TRANSCRIPT OF RECORD ON APPEAL

made and entered of record December 27, 1929, in said court and cause in words ~~and figures~~ following to wit:

At this 27th day of December, 1929, comes Edgar C. Jensen, Assistant United States Attorney, and upon his [fols. 95-97] motion and good cause therefor appearing, it is ordered by the Court that the time in which to file the transcript of the record by the United States on its appeal and by the Carbon County Land Company on its cross appeal be enlarged to and including the 31st day of January, 1930. And it is further ordered that the final settlement of the condensed state of the evidence be continued to the 31st day of January, 1930, and that the hearing on said condensed statement of the evidence be set for January 3, 1930.

[fol. 98] IN UNITED STATES DISTRICT COURT

Statement of Evidence—Filed Jan. 29, 1930

APPEARANCES OF COUNSEL

For the United States of America: Mr. Nat M. Lacy, Special Assistant to the Attorney General; Mr. C. R. Hollingsworth, United States Attorney for the District of Utah.

For the Carbon County Land Company: Mr. Samuel A. King, Mr. Creighton G. King.

For the Independent Coal & Coke Company: Mr. M. E. Wilson.

For the State of Utah, Intervenor: Mr. George P. Parker, Attorney General for the State of Utah, appearing for said State under and pursuant to authority vested in him and direction given to him by the Honorable George H. Dern, Governor of said State, intervention of the State of Utah in this case being made under and pursuant to directions and authority given by said Governor as required by section 5682 Compiled Laws of Utah, 1917.

This suit was duly tried and testimony therein taken, and proceedings had therein, commencing on the 1st day of April, 1929. The following is a condensed statement of the evidence prepared and lodged by counsel in accordance with Equity Rule No. 75.

By Mr. Lacy: May it please the court in lieu of the deposition of Joseph A. Taff, who testified in the United States v. Truth A. Milner, et al., it is stipulated and agreed that the transcript of the testimony of Joseph A. Taff taken in that case, may be read in evidence in the instant case, and received with like effect as though he were personally present and testifying, subject to all objections for incompetency, irrelevancy and materiality that may be made. Is that agreed to? That is agreed to by counsel for defendants, and for intervenor. Mr. Wilson thereupon, in behalf of the Independent Coal & Coke Company, offered the following statement, which counsel for the government agreed to, that F. W. Nixon, Secretary of the Independent Coal & Coke Company, if called, and sworn to testify as a witness, would say was correct, and that defendant, Independent Coal & Coke Company had not paid taxes since this suit was brought because of an understanding that was had with the State. The statement is as follows:

[fol. 99] DEFENDANTS' EXHIBIT A

"All Agreements are contingent upon causes of delay beyond our control, including strikes, accidents, riots, acts of God, lockouts, fire, flood, inability to secure cars or transportation. Quotations subject to change without notice.

Independent Coal & Coke Co.

Mines: Kenilworth, Carbon County, Utah.
John H. Tonkin, Gen'l Manager.
General Offices: Walker Building, Salt Lake City, Utah.

Mar. 28, 1929.

Mr. M. E. Wilson, Newhouse Bldg., City.

"DEAR MR. WILSON: Complying with your request the following amount of taxes have been paid by us on 1120 acres of coal lands purchased from Carbon County Land Co. now under contest.

Description	Acres	1920	1921	1922	1923	Total
Sec. 3	640	$1,105.86	$7,215.50	$8,026.74	$7,779.22	$24,127.32
N. ½ Sec. 10....	320	774.10	4,052.88	4,628.16	4,111.36	13,566.50
N. ½ Sec. 11....	160	110.59	678.86	744.56	721.80	2,255.71
	1,120	$1,990.55	$11,947.34	$13,399.46	$12,612.18	$39,949.53

"'From year 1924 taxes on above lands have not been paid pending result of suit for title, this arrangement being made by State Board of Equalization.

Yours very truly, F. W. Nixon, Secy."

FWN/S. Ex. A. Dft.
"Aberdeen Is the Coal to Burn."

By Mr. Wilson: I would like to describe it briefly. We paid taxes for the years 1920, 1921, 1922, 1923. This exhibit A shows the amount of taxes paid on each subdivision of land and the total tax is $39,949.53. Now I would like to make an explanation with reference to that and if it is accepted as evidence it will avoid the necessity of my produc- [fol. 100] ing some testimony. Of course if the court takes judicial notice of the fact that this suit was instituted in May, 1924, May 16th I think it is. We paid no taxes for the year 1924 or any years since because of the institution of this suit. That year's taxes was payable in November and prior to the first of December when this suit was instituted, so then we had a sort of a gentleman's agreement, I might say it was nothing more than that, perhaps it had some legal force, with the State officials that we were not to pay any taxes, that the taxes were to be held in abeyance and charged up against us until the questions involved in this suit were determined. We became the owners of this land

as we contend in October, 1920, and paid taxes for that year amounting to $1,990.55 and the taxes then went on up, so that in the year 1923 we paid $12,612.00 taxes and the entire amount as stated.

Is that statement of mine in substance accepted that we paid no taxes since that time on account of the pendency of this suit, and that we are ready and willing to pay taxes and have been at all times except for the pendency of this suit, otherwise I will put some evidence on.

The Court: You can agree to this, can't you, that Mr. Nixon, if called and sworn to testify as a witness, would say that that defendant had not paid the taxes since this suit was brought because of an understanding that was had with the State.

Mr. Wilson: That is satisfactory. I don't ask Mr. Lacy to concede the fact.

Mr. Lacy: It is conceded the witness will testify to that.

The record of the testimony of Joseph A. Taff, taken in the case of the United States v. Truth A. Milner et al., was then offered in evidence on behalf of the government by Mr. Lacy.

Mr. Parker: The State of Utah desires at this time to object to this testimony as being incompetent, irrelevant and immaterial. I desire to call the court's attention to the point that the evidence relates after the time that the lands were certified to the State. In other words, we take the position that the Government must show these lands were mineral in character and were known to be mineral at the time and prior to the time when they were certified to the State of Utah by the United States. Now any of this testimony that tends to show conditions that have developed after that time, we object to as incompetent, irrelevant and immaterial.

Then we also take the position of course that the title of [fol. 101] the State—this being the first time that the State has been a party to these proceedings in this case—that the statute referred to is the statute of limitations describing the time period in which the government may object to title and bring an action to set aside the certification as run, and we desire our objection as stated on that ground.

Mr. King: On behalf of the Carbon County Land Company I desire to join in the objection and desire to add the additional objection as a part of the objection that by the

testimony which is sought to be introduced there is an attempt now to offer evidence with relation to what is termed a geological inference or rule which did not prevail at the time of the adoption of the enabling act by the State of Utah, a rule that did not prevail and had not prevailed during that portion of the time when these entries which are now in question were involved, and for the further reason that it is now attempted by this testimony to change the circumstances or condition under which this application could be partially made at that time.

Mr. Wilson: In behalf of the Independent Coal and Coke Company I desire to join in the objection made and state specifically that the theory of the Independent Coal and Coke Company is that this land was certified to the State, and that upon that certification the title passed to the State, and that it is immaterial now in this proceeding, wherein the State is a party, whether the lands were known mineral lands or not, the statute of limitations having run in behalf of the State many years prior to the institution of the present action.

Thereupon it was stipulated that any objections made in behalf of either, or any, of the defendants might be considered for the benefit of the other defendants.

The Court: You may put in the testimony under your own theory.

Mr. Wilson: We may have an exception, this question could have been raised later on but these gentlemen here thought it perhaps better to make some record of it now.

The Court: The court will hear the testimony, you may proceed.

Thereupon the testimony of JOSEPH A. TAFF was read in evidence as follows:

[fol. 102] Direct examination.

By Mr. Maynard:

My name is Joseph A. Taff, age 47 years; residence, Palo Alto, California. Occupation, geologist. I have been occupied in making geological surveys and investigations continuously since 1888. In 1885 I entered the Arkansas University as a student of geology, where I continued for three

years. At the expiration of that time I was employed on the Arkansas Geological Survey as Assistant Geologist, and continued one year, when I took employment with the Texas State Geological Survey, and there continued until 1894. Immediately thereafter I was appointed on the United States Geological Survey as Assistant Geologist, and was geologist until the fall of 1909, at which time I was employed by the Southern Pacific Company. My headquarters are now at San Francisco, California. I was with the United States Geological Survey about fifteen years. With the beginning of my work in connection with the government I commenced investigations of the Appalachian coal fields in Maryland, West Virginia, Kentucky and Tennessee. That time consumed three years. I then took up the survey of the coal fields of Oklahoma, where I continued until 1905. In 1905-1906 I was detailed to make special investigations and classifications of coal lands in Colorado and Utah. In 1907 I was employed in similar surveys of coal fields in northern Wyoming. In 1908 I returned to Oklahoma and resumed investigations and surveys of the coal and oil fields, and similar work continued during part of 1909, to the time of my leaving the government service.

I received instructions from the Department of the Interior to survey the coal lands in Carbon County eastward from the town of Sunnyside, or the vicinity of Sunnyside, westward and southward through the field, in so far as the coal lands were found to be sectionized westward to what is known as the Book Cliffs in the vicinity of Castle Gate, Winter Quarters, and Clear Creek; thence southward along the Wasatch plateau, extending through Carbon County, and into Emery County, and to a small extent in Sevier County. The purpose was to ascertain what lands were coal lands for the purpose of classifying.

I had a party under my charge which consisted of two divisions, each in charge of a competent surveyor, one of these headed by J. E. Chapson. The other division of the party consisted of Mr. S. Phillips and Mr. Arthur Knabel. The second party located coal out-crops, coal prospects, coal [fol. 103] mines, and other geological features that were found to be necessary in connection with the classification of coal lands. These instrumental surveys being always checks and controlled by the land lines and the land corners established or located by the first division of the party.

With these plans, established surveys were begun in the vicinity of Sunnyside and carried westward through what is known as the Book Cliffs in Carbon County to Castle Gate.

The entire coal field as outlined from Sunnyside westward to the vicinity of Castle Gate is a unit. In other words, the same geological conditions prevail throughout the field. In the Book Cliffs from Sunnyside westward to Castle Gate the rocks are tilted slightly towards the north. From the foot or base of the Book Cliffs southward the formation consists entirely of shale, which makes the valley of Price River and the valley known as Castle Valley. The principal sandstone formation and formation carrying the workable coal beds were found to be continuous wherever exposure was contained throughout the district.

I know the lands that are particularly described in the bill of complaint in this case. They are west and north from Sunnyside eighteen to twenty-five miles. In 1906 and 1909 I examined these lands for the purpose of ascertaining the character of the lands.

The maps which have been marked for identification, Exhibits 1 and 2, were made under my immediate direction. Exhibit 1 is an exact copy to scale of the original land office plat furnished by the General Land Office on the scale of 2 inches to a mile.

By Mr. Maynard: I offer in evidence as part of the complainant's case these exhibits marked as they are 1 and 2 for identification, and do not mean by that offer that I offer them to prove the facts, but merely illustrative of the evidence that I am going to introduce.

(Here the witness explains in detail maps, Exhibits 1 and 2.)

This Exhibit 1 is an exact copy of the original land office plat. The position of the lowest workable coal bed as surveyed instrumentally through the district is marked on the map by a heavy meandering black line. All prospects of natural exposures are located by a symbol in the form of a black cross. All mines are located on the map by cross hammers symbol. The lands described in the bill of complaint [fol. 104] are bounded on the map by heavy black lines bordered in brown color. The rock formations that include the workable coal beds are shown on the map by reddish

tint. The formations extending from the top of the known coal-bearing group and upward to the top of the Book Cliffs are shown on the plat in yellow tint.

From the result of my official examination of the lands described in the complaint, the lands were determined by me to be coal lands. The facts, or data, upon which I base the classification of the coal lands in question are practically as follows: The location or accessibility of lands in question with respect to the recovery of the coal, in respect to the possible recovery of the coal by mining operations. Second, the attitude or position of the coal beds, in other words, the structure of the rock with which the coal beds are associated. Third, the number, the thickness, and extent of the coal beds. Fourth, the physical character and quality of the coal. Fifth, the position of the lands named in the bill with respect to the coal. They are located on the Book Cliffs, and extend from the plateau north of the cliffs southward into the canyons, in certain instances, and traced the base of the cliffs south.

The principal coal bed which occurs at the base of the coal-bearing series lies almost immediately upon a distinct sandstone formation, which is traceable, and almost continuously exposed, through the district, and in a number of places touches the out-crop places named in the bill of complaint.

One of these beds has been prospected. These coal beds are found with a thickness ranging from three feet to eighteen feet.

(Here the witness described in detail the lands in the section of country referred to.)

Exhibit 2 is a map including Township 12 South, Ranges 10 and 11 East, a small portion of Township 12 South, Range 9 East, and all of Township 13 South, Ranges 9, 10, 11, 12 and 13 East.

Referring to Exhibit 2, the territory embraced in the lands marked blue contains (a-) area of 1080 acres, as shown on the plat. The lands marked yellow on the map are school lands purchased. There are approximately 2240 acres.

On the surface there is a small amount of timber in the form of pine trees, and a small amount of spruce, etc. That [fol. 105] part shown on the map in pink color is practically barren. The northern edge of that pink color is bounded by high cliffs for the most part of the Castle Gate sandstone. Immediately below, and for some distance below, the slopes

are very steep and stony, and covered with sandstone debris. The area indicated in the yellow shade lies between this heavy cliff of Castle Gate sandstone and the top of the plateau or middle of the plateau.

That territory is mountainous country, and it is rough and broken in part, but not entirely so. It is not adapted to agricultural purposes. It is too steep, and too stony for profitable cultivation. Besides, it would require irrigation to be profitable to cultivate it, and from the character of the surface I would conclude that it could not be irrigated profitably, even though it could be cultivated. The Coal Creek affords a small amount of water. Coal Creek extends through the central part of the subdivision described of the lands in question. And the coal in the beds that project into these lands are susceptible of being extracted through the continuation of the tunnels in the immediate vicinity, or by shafting in the southern part within the limits of the territory described. The coal in the northern portion of the territory that is under cover 3,000 feet could be profitably extracted by extending the entries from the outcrops or from shafts put down northward and laterally.

Calling attention to Exhibit 2 to the lands that I have particularly described adjacent to this portion marked blue, it is described as the Southwest of the Southeast of Section 3; the West half of the East half of Section 10, Township 13, South of Range 11 East, and the other one would be described as the Southeast quarter of the Northwest quarter, the North half of the Southeast quarter, the South half of the Northeast quarter, and the Northeast quarter of the Northwest quarter, and the Northwest quarter of the Southwest quarter of Section 10, Township 13 South of Range 11 East.

Assuming that the records show that Mr. Milner, or some one of his family, or some one in his interest, entered these lands that I have now just particularly described as marked in blue in Exhibit 2, entered those lands as coal lands, and paid for them as such, the lands that are marked in the subdivision on Exhibit 1 that I have been testifying about, do not adjoin these coal lands, they come within a fourth of a mile. They adjoin other lands named in the bill of complaint that were alleged to have been entered by Mr. Milner, and [fol. 106] it was just simply extending the coal that appears in those coal cash entries, extending the coal lands north-

ward to reach the lands in question. Parts of these lands that were indicated on the map as coal cash entries are further from the outcrop from known appearance of coal than certain lands named in the bill of complaint, so far as this particular subdivision is concerned.

The particular part of Section 9 described as the Southeast quarter of the Northwest quarter is a distance of a half a mile from a known outcrop, and a distance of something like one mile from a known occurrence of coal as a prospect, while the land named in the bill of complaint in Section 3 is within less than one-fourth of a mile from the known occurrence of coal or the occurrence of coal where it has been mined.

The particular part of Section 9 described as the Southeast quarter of the Northwest quarter is a distance of a half a mile from a known outcrop, and a distance of something like one mile from a known occurrence of coal as a prospect, while the land named in the bill of complaint in Section 3 is within less than one-fourth of a mile from the known occurrence of coal, or the occurrence of coal where it has been mined.

From my examination of the lands in question as to whether or not the lands that I have just described in this subdivision and immediately north of the lands entered as coal lands are just as much coal lands as the lands that are admittedly coal and entered as such. In certain parts, I should say so. In certain parts the lands indicated on the plat as coal cash purchases extend down to and cross even beneath—or even below the known occurrences of coal. As to whether I would enter, or would purchase the lands that are particularly described in this subdivision that I have called my attention to with as much certainty of developing coal thereon in quantity and qualities to justify the expenditure as I would in the lands that were embraced in the blue, I would say I would in certain parts. I mean by that, in certain parts of the lands named in the bill of complaint, they are as easily accessible from the known occurrences of coal as the lands indicated in the blue as coal cash purchases.

The southern part the part of Section 4, for instance, of 10, 12 South, Range 11 East, are contained in the subdivision that you (Mr. Maynard) have called by at-ention to. The nearer certain lands are from the known occurrence of coal as in this case, the less the depth from the surface down

[fol. 107] to the coal, and the less expenditure there would be in operating the coal. For that certain lands so located would be preferable to lands that are underneath the cover. The sole objection to profitable mining is based upon the depth of cover and approximate distance to the openings, but there is no portion of this territory of this subdivision that is not susceptible of profitable mining.

I see on the map 320 acres in Section 26, Township 12 South of Range 11 East, described as the North half of Section 26, containing 320 acres. That part of Section 26 lies across one of the principal parts of Coal Canyon, and would be similarly situated with respect to the occurrence of coal as the Northeastern part of Section 27 and the Southeast part of Section 22 as it is described in this former parcel of land named in the bill of complaint. That is within the reach of practical mining from the coal. The coal would be beneath this tract of land as before indicated, farther down the canyon in Sections 3 and 10. It is about two miles away from the outcrop. There are other occurrences of coal, or evidences of coal, besides this outcrop two miles south on the land. There are none nearer than those, and the same bed of coal as described in the former should be present in the same manner. It should extend to the north. The character of the surface is substantially as I described in the former. It is in part in the canyon and in part upon the edge of the plateau, except in the west side of the canyon. In this part of Section 26 the surface is comparatively smooth, though steep. It is brushy; and contains grass. This line, as shown on the plat bordering the yellow from the greenish tint, is the edge of the plateau, or the edge of the cliff. From that line the slopes are steep down to the canyon on one side and comparatively smooth and rolling on the other side. By the naked eye when looking at this irregular line, the abrupt break from the steep slope from the canyon to the plateau could be seen, and in many instances it is bordered by sandstone ledges, and in some places cliffs of sandstone and limestone mark in rather an abrupt change from a rolling tableland on top to comparatively steep slopes of the canyon on the other side.

Having my attention called to 477.4 acres in Section 33 of 12 South, Range 11 East, and Lots 1, 2, and 3, and the Southeast quarter of the Southeast quarter of Section 3,

Township 13 South, Range 11 East, the two parcels of land being separated. These are the lands on Exhibit 2, which in part separate the lands entered as coal lands that I have identified a little while ago, and the lands to the north, so that that makes a continuous holding from the north line of [fol. 108] 23 down to the south edge of Section 10, 13 South, 11 East. The North half of Section 33 is practically all upon the plateau above the cliffs, and would be, except the northeast corner, which extends down into a fork of Coal Canyon, nearly 3,000 feet above the occurrence of coal, or upon the northeast corner of the tract of land in Section 33, being down in the canyon, and approximately, Oh, 2,500 feet above the occurrence of coal vertically. The occurrence of coal would be beneath this tract of land, considering the coal-bearing measures to pass to the northward, as is shown on the ground. The outcrop is here in Sections 3 and 10. The outcrop from this particular territory is about a mile southeast.

It would be entirely practicable to mine the coal from the outcrop to these lands, and beyond. As to the thickness of coal at the outcrop, there are, as I have explained, several beds, the uppermost bed is 4 feet 11 inches, and another workable bed that was prospected was in the neighborhood of 8 feet. Those beds extend to the northward beneath these and adjoining lands, without question, so that tunneling and excavating at the cuts at the outcrop, and continuing on, you should reach the coal that is under the cover in these particular lands. The surface of that part of Section 33 is almost entirely upon the plateau. It is comparatively level and smooth, and was being grazed with sheep at the time we were inspecting.

Having my attention called to a body of 2244.22 acres embraced in all of Sections 1 and 3, and the North half of Section 10, the North half of Section 11, and the North half of Section 12, all in Township 13 South, Range 10 East, I see on the map that body of land. The nearest outcrop of coal to those lands is in the Northeast quarter of the Southwest quarter of Section 11, Township 13 South of Range 10 East. At this point the coal has been mined in towards the lands within a distance of about 1,000 feet or less. It is in the east fork of Cordingly Canyon. Another mine,

known as the Aberdeen, in the Northeast quarter of the Southwest quarter of Section 10, the same Township, lies within about one-fourth mile from the lands named in Section 10. At this locality the coal was being mined in the direction of the lands in question. Another occurrence of coal is in Allred Canyon, in the center of the Southwest quarter of Section 12. This occurrence of coal is within about one-fourth mile of the lands named in Section 12. At all of these localities the coal extended in the lands to the north at an angle of four to five degrees, and without any [fol. 109] reasonable doubt, extends beneath the lands named in the bill upon part that I have described.

In Section 10 the depth of cover beneath the southern boundary would be, Oh, probably 300 feet, and in Section 11 in the east fork of Cordingly Canyon the coal would be not exceeding 200 feet beneath the lands in question, an estimate; and in Allred Canyon in Section 12 the coal as shown in outcropping would be the lowest—coal should be reached at a depth of 300 to 400 feet beneath the lands named in question in Section 12. In this vicinity, as I remember now, there are four beds of coal exposed. As to whether each of the four beds extend into this territory, they should; they are parallel with the outcrops and extend beneath the land immediately to the north. Whether all of them do, of course, is a question. As to how many I say that positively do, I could not say, but where there are as many coalbeds as this, and where they have been exposed for miles and miles east and west and up canyons to a very much greater distance than the distance from these outcrops to the lands in question, I do not see that there can be any reasonable doubt, but what they extend, some of the beds at least, beneath the land. The most that is known, of course, of the coal is up near the base of the group. That is the lowest, that they have been prospected most extensively. This body of 2000 acres is adjacent to lands marked in blue on Exhibit 2. They were entered by Mr. Milner or someone in his behalf. There are two tracts in blue on this map that adjoin the land just described. These occur in Sections 10 and 15. By description they are as follows: The East half of the Southeast quarter and the West half of the Southwest quarter of Section 10; the North half of the Northwest quarter of Section 15, Township 13 South of Range 10 East. These two bodies lie on

each side of the west fork of Cordingly Canyon or upon both sides of the Aberdeen mine. As to what is the difference, as a matter of fact from a geological standpoint, between these admitted coal lands which were entered and paid for as coal lands, and these that immediately adjoin, that are adjacent to them, with the single exception of the cover of earth, certain parts of these lands that are shown in blue and indicated as coal cash purchases, extend down over the crop into the lowest coal. Certain other parts extend above the lowest coal and are as far removed from the known occurrences of coal as the lands along the southern edge of those named in the bill of complaint in Section 10. In certain parts there is not a particle of difference. No, as far as can be determined from an examina-
[fol. 110] tion of the surface. So far as I know, as to the general character of the surface of those 2,000 acres in the northern edge of this particular parcel of land in Section 1 and 3 of Township 13 South of Range 11 East, are upon the southern edge of the plateau above the cliffs. This area above the cliffs enclosed about 320 acres of land, 350 I guess probably. The remainder lies on the steep slopes of the cliffs that face towards the south. The larger part of those as a whole of those lands in Sections 10, 11 and 12 are beneath the outcrop or below the outcrop of the Castle Gate sandstone, and lie in an extremely rugged district. The larger part of the land as indicated on the plat in yellow is comparatively steep and comparatively rugged. It may be is in part covered by timber. When I say timber I mean timber of a commercial value to a certain extent. To a certain extent it may be said good for sheep; to a certain extent at times when water is present on the ground, surface water. In the summer season there is no water present, with the exception of probably one place in Section 3 that I know of. As to how much of the summer season there is no water I couldn't judge about that. I should say after the snow is entirely removed from that table land, which would be probably in June. The district was examined in 1906, as I remember, in either the later part of May or in June. At that time the snow was gone, and there was no water on the surface, and on that ground I made my statement. But as a part of my work as a government expert, I was called upon to make an examination of the sur-

face for the purpose of enabling me to classify it, and it was the result of that work that I gave this testimony.

As to whether or not any of these lands in question could be used for any purpose other than for sheep to graze over them in a small portion of the season a part of the area is of slight service for timber. Yes, certain parts. Certain parts contain none. I should say that it would not be serviceable for agricultural purposes in the true sense in any respect. It may be utilized for grazing purposes during the whole of season and during a portion of the season while the snow waters are in existence. In certain parts of the area during the season when it isn't too cold or there was not too much snow there is water on the north slope, where animals could be taken to water and returned to this tract. These streams that lead toward the north contain more or less water on the table land.

[fol. 111] Tuesday, January 11, 1910.

I, in particular, examined the lands marked on Exhibit 2 that are marked yellow, and which are school lands.

By Mr. Maynard:

Q. Please give us the result of that examination?

By Mr. Edwards: I object to the question on the ground that the same is incompetent and does not tend to sustain the bill in any way, and is not within the issues made by the pleading in the case.

Witness: In regard to the school lands indicated on the plat in yellow, I examined only the southern part of that part contiguous to a branch of Spring Canyon in Section 16, Township 13 South of Range 12 East. This examination was made in 1906. In 1909 the school lands shown on the plat in Section 32, Township 12 South, Range 11 East and uncolored Section 36, Township 12 South, Range 10 East, together with the school Section 2, Township 13 South, Range 10 East, and school Section 2, which is a fraction of the Section in Township 13 South, Range 11 East, these were examined more particularly because they are contiguous and in contact with lands named in the bill of complaint, which were examined specifically as to their character and geology in 1909.

The school lands marked in yellow on Exhibit 2 have been classed as coal lands because coal beds extend northward beneath them from the slopes of the cliffs to the south, and they are within reach of practicable mining from the outcrops.

The lands marked on Exhibit 2 colored in brick color are in the bill of complaint. There is a large area marked in the pink, and I know something about a part of those lands, that part is contiguous or not very far removed from the outcrop of the coal-bearing rocks in Township 13 South, Ranges 12 and 13 East. On my examination I found in a number of places, Township 13 South, Ranges 11, 12 and 13 East, that the coal outcrop of the lowest bed and the outcrop of the whole coal group extended in and through parts of these lands. In the other three townships mentioned none of these lands touch the outcrop of the lowest coal bed. In some localities the coal has been exposed, exposed by prospecting of these lands, especially in Township 13 South, Range 13 East. In the other townships mentioned, the coal beds are not known to have been prospected or exposed artificially.

These are lands marked in purple on the map. The first [fol. 112] described in Section 7 are upon the outcrop of the coal-bearing rocks, and contain two prospects on the coal. The second named in Section 21, same township, extends across the coal outcrops and contains one prospect. The lands in Section 22 extend from the edge of the coal-bearing rocks onto higher rocks and contain no outcrops of coal known to the witness.

The parcel in Section 23, Township 13 South, Range 12 East, extends across the outcrop of the lowest workable coal, but contains no known exposures. The parcel of land in Section 25, same township, extends across the edge of the coal-bearing rocks onto lower rocks containing no outcrop of coal. The parcel in Section 19, Township 13 South, Range 13 East, extends across the outcrop of the workable coal and contains one coal prospect. The parcel in Section 30, Township 13 South, Range 13 East, extends from below the workable coal bed onto higher rocks and contains no known exposure of coal. Parcel in Section 31, same township, extends likewise from rocks that lie below the coal upward above the coal-bearing rocks, but contains no exposure of coal. Parcel in Section 32, Township 13 South, Range 13 East, extends from rocks below the coal up onto coal-bearing rocks and contains one prospect on the coal bed. Parcel contained in

Section 33, same township and range, lies on the edge of the coal-bearing rocks, but contains no known coal-bearing exposure.

I would, without question, consider them as coal lands, because coal is exposed in the vicinity, and would extend beneath them with probably one exception that I did not note, that is the Southwest quarter of the Northeast quarter of Section 25. Township 13 South, Range 12 East is almost entirely below the outcrop of the lowest coal bed.

By Mr. Maynard:

Q. Well, now, Mr. Taff, what do you say, with the exception, as I now recall your testimony, of 75 or 100 acres at the furthest in all of this large territory embracing roughly, as I remember it, about 33,000 acres, what do you say as to whether or not a practical mining man, a man that understood coal formations, would be justified in expending his money and making large investigations, because of all of the lands containing coal of such quality and in such quantity as would reasonably warrant him in reaching the conclusion that they were all capable of being profitably mined or worked?

By Mr. Edwards: I object to the question as being incompetent, irreleant and immaterial, and calling for the conclusion of the witness.

[fol. 113] Witness:

A. It is the custom of practical coal operators to include within their holdings of coal land, where the field has been proven to the extent this field has, to include in their holdings as coal land further removed from the known occurrence or outcrop of coal than is found in these lands referred to.

In fact, considering any parcel of land extending back from the outcrop, it would become necessary in order to expend money in developing or establishing coal-mining plants of large extent, to control lands extending as far or farther back from the known outcrop, as in this field, in order to operate sue-essfully under those expenditures.

By Mr. Edwards: I ask to strike out the answer as not responsive to the question.

Witness:

A. And for that reason he would before beginning mining operations seek to control areas of land extending for considerable distance back from the point of mining operations, which would be, in this case, probably most successfully carried on from or near the immediate outcrop.

Cross-examination.

By Mr. Edwards:

I lived in farming districts of Tennessee and Arkansas. I have stated practically all the experience that I had since I first became an employe of the government. I never was engaged in any business on my own behalf, other than this geological business. I haye never had any experience in studying climatic or other conditions of the big ranges of the United Statse. I know nothing about the live stock business in a practical way. What I know about the subject I have learned principally observing the effect of stock grazing on ranges and by conversing with stock men. That is as far as my observation went. I never made any particular study to see what kind of vegetation particular kinds of animals eat, and the order in which they would resort to eating it in the absence of other kinds of vegetation.

I cannot name a particular plant that sheep upon the public range will seek first as most desirable to eat. Sheep will eat sagebrush to a certain extent, and many other plants that grow upon the desert ranges. I have exercised my own judgment in my own mind as to what was considered a good average range for sheep, but I am not prepared to say whether it is a mature judgment from a practical standpoint of a sheep man.

[fol. 114] I am not a graduate civil engineer. I am competent to handle the instruments used in surveying. When I used the expression "base" I meant the local subdivision and those drainage channels which I have marked upon the map. Rock Canyon, Pace Canyon, and those others. The base of these maps was acquired by me from records of the General Surveyor's office. They are copies, and are the same as the plats that appear of record in the General Surveyor's office of the State of Utah. Field notes were obtained the same way. I never saw the field notes with reference to legal subdivisions. I saw copies. Copies were with

the party. I did not run the instrument in the surveys. I was present when the surveying was done. As a matter of fact, I do not know absolutely whether these maps, as they appear, the base of these maps, correctly represent the lines upon the ground or not.

Personally, I do not know of my own knowledge from having looked through an instrument, and seen the measurements made upon the ground, and having checked them with those surveys, whether they check out with the government surveys or not.

By the term "coal bed" I mean the coal itself.

The light pink line on Exhibit 1 indicates the area of land between the crop of the lower coal and the crop of what is known as the Castle Gate sandstone, which lies above the coal-bearing rocks.

The plat was left here in the hands of Mr. L. W. Walker, as I remember, after I left here when we made the examination. Mr. Walker is not now present. I have not been able to locate it.

By the term "graphic notes" I mean when I occupy a certain position, take the bearing with the compass, that bearing instead of being written down is platted on the map, and all other references are platted directly on the map instead of being written down in a note book, and the original notes were recorded on the plat. I was working in company with Mr. Walker, and when I left here in the summer the plat was left in his hands, and he was supposed to be here, but he is not present. I am giving this description from memory; it may be at fault in some little particular.

The yellow covering represents the slope between the top of the cliffs and the Castle Gate sandstone. That slope is not near so steep as a whole as the slope below the Castle [fol. 115] Gate sandstone. The northern part of this is quite steep. I separated upon this map the ground below the Castle Gate sandstone from that above because that above is not so steep. It contains more vegetation and is more accessible. That is the reason I colored it differently and separated it—physical features and surface character. There is no more vegetation there, grass, sagebrush and grease wood. There is a little more grass, but not as I remember any more sagebrush. That brush I refer to in all instances is growing brush, such as sheep would browse upon. The faded green color lying still northerly above and

beyond this crest of the cliffs represents the plateau above the highest point of the cliffs.

The lands on the plateau are, for the most part, fair grazing lands. Sagebrush is, as a rule, very thick—sometimes so thick it is difficult to walk through. Where the sagebrush is thickest there is less grass. In some of the valleys there is little sagebrush and fairly abundant grass. That area contains some aspen thickets.

Having my attention called to Section BB upon Exhibit 1, that light greenish blue on the top of the cross section is intended to represent the area—or rather that represents the class of rocks along that section line—the green on that section line represents the class of rocks along the section line towards the north end that are underlain by the rocks that crop out on the crest of the Book Cliffs, rocks that are shaded green. Those rocks that I represent by the light green are sandstones and shales, and some limestone. They are about 600 feet thick, that is an estimate. The light yellow in that cross section represents the rocks along that section line that crop out between the top of the cliffs and the Castle Gate sandstone and between the top of the cliffs and the top of Castle Gate sandstone. They are (approximately) six or seven hundred feet thick.

The light pink tint represents the rocks along that section line between the lowest coal and the top of the Castle Gate sandstone. That is about 1,200 feet thick. I term all that belt in pink as the coal-bearing belt, and that alternates in sandstone and shales and coal. And the black lines at the bottom of that Section B is intended to represent the coal that I have indicated upon Exhibit 1 as the outcrop. That irregular line at the bottom of the area represents the lowest coal. The true strike of these coal beds, of the coal measure is a little south of east and north of west. I would suppose that it would be about 80 to 85 degrees east and north 80 to [fol. 116] 85 degrees west. The degree of general dip is four to five degrees. It was pretty nearly a uniform degree all along that section as portrayed on this map, Exhibit 1. It seemed to be a little less as you went north, but the variation was slight I think. The various measures of coal lie substantially parallel one to the other. Taking it from the Castle Gate to, we will say, Section 34, Township 13 South of Range 13 East, the greatest number of beds of coal I found was six, I believe. As I remember, six separate beds

of coal in Coal Canyon approximately on the line of this section. That is the only place I remember that I saw six beds. There were four beds, I believe, exposed in Helper Canyon, Township 13 South, Range 10 East. As to whether I did examine that country for the purpose of determining whether these six beds of coal extended through the entire area or whether, as a matter of fact, some of them pinched out and terminated. I made all the observations that I was able to to determine the continuity of the coal beds by examining for exposures. I did not find any point where any of those coal beds terminated, or their continuity ceased in that area. *I did not find any point where any of those coal beds terminated, or their continuity ceased in that area.* I did not find any point that indicated that they were ceasing or becoming more contracted. There were long distances there where I found no indication to exceed four beds of coal. The reason why I did not see indications of the other two beds was that the surface as a rule contains débris so that the edge of the coal is concealed in many places.

I could not be understood as saying that I am assured that six beds continue through there, because some of these beds, the higher of these beds are not exposed in many places to get an idea of their continuity.

In the testimony that I have given in this case as to the geology in this section I did not assume that there were six beds of coal continuing in their continuity through the entire section. I believe in the giving of my testimony I assumed that one or more had a continuity through that section. One or two at least. Those would be the lower coals. The two beds are about forty feet apart. The lower one is nine feet and the other is four feet ten inches—that is practically five feet—that is fourteen feet, and they are forty feet apart. Fifty-five feet then incorporated in the entire width between the outlying borders of the two veins so that this line appearing as marking the lower bed is broad enough to cover both of those lower beds of coal that I assumed ex- [fol. 117] isted. When I said that that line would possibly cover 100 feet in width, that is just an estimate, I could not say. In that neighborhood I imagine so. So that in my testimony which I have given I have assumed that there are only two beds of coal cropping along what I call the coal crop. That is what I call it, the coal crop. When I speak of the crop of one coal bed that just refers to that one. The

crop of the coal group, I referred to that; I thought that would apply to the whole business. When I speak of the coal crop I have reference to the coal that is found within this section. (Indicating.) I do not mean to be understood as saying the only two beds of coal that I considered in my testimony when I spoke of the coal here were the two lower beds. I said under the circumstances I would consider there were at least two. I do not say those were the only two, I am prepared to say, I think have continuity, that I am prepared to say I am reasonably well satisfied have continuity there from what I saw. I said in this locality.

No, I could not be understood as saying that only two, and indicating the two beds that would be continuous through this field, this district. The two lower beds are more continuous, as far as my knowledge goes, than other and higher beds, because I know more of them. They are more exposed—there is also a third bed that is known in a number of localities in this district. I do not think I was understood to say on direct examination that I thought beyond all question there was continuity to these two lower beds of coal. I believe there is continuity to these two lower beds of coal there, I believe so. I believe so from information that I have regarding it. The information I have is that which I have heretofore testified to. I think there is a third bed. I am not assured that it is the next bed above these two as disclosed at Coal Canyon. I remember about how far it was above these two lower beds that I saw the third bed that I refer to, but I am not assured that it is a third bed as found in a widely separated district, because, as I have stated before, the third bed, and some higher beds, have not been exposed to the extent that the lower beds have, and for that reason I have not information to base a judgment as to their continuity. There are six beds outcrop in Coal Canyon as I remember. The second bed is about 40 feet above the lowest bed, the third bed of this locality is about 15 feet above the second just mentioned, so that even the third bed then would be represented by this irregular line which I have drawn here to represent the lower coal bed—well, yes, it might. I am not assured [fol. 118] that the third bed in this district is recognized; I could not certify that, that that is the third bed as found a number of miles to the west. Well, the third bed, as I

remember, is—the third bed is recognized in Cordingly Canyon in Township 13, South of Range 10 East. The first and second bed are disclosed or exposed in that canyon. The lowest bed—the lowest bed there is exposed in that canyon. Some of these six beds exposed in Coal Canyon might possibly discontinue their continuity on their strike before they reach Cordingly Canyon. There is no way that I know of by which a geologist, or anyone else, can determine the continuity of a given coal bed, except by optical operation, or by some tangible observation, like prospecting, that is by using a diamond drill. We used no diamond on their dip into the earth extend beneath the surface of drill in this district. I have testified to all of the facts from which I have drawn a conclusion that these coal beds this particular local subdivision.

Wednesday, January 12, 1910.

Cross-examination of Mr. Taff resumed.

By Mr. Edwards:

I did not find an exposure on either one of the four upper beds, than those already testified to. It may be said that there was just one exposure upon the four upper beds of coal, because one of those beds, not the uppermost one, as I remember, was shown in natural exposure in the creek in one locality in Coal Canyon. That is the only place where I observed an exposure on either one of the four upper beds. The dimensions of the exposure was about 40 feet, as I remember, and exposed only in the tunnel. This coal rests upon sandstone, a sandstone floor, and has a shale roof. The width of the exposure and the thickness of the coal bed was about 4 feet 11 inches, and the length about 40. The direction of the tunnel was between the strike and the dip. The coal was not able to trace through the field. None of these upper coals have been able to trace through the field as the lowest one. The first one below th top was exposed. These coals are known only in Coal Canyon. It was exposed so I could see it. The thickness of that coal is 2 feet 5 inches. The coal where I saw it was comparatively fresh—the rocks were in position where they were swept, as a rule, when the high water reaches

near the canyon level, and the face was clean. It was comparatively fresh. The third bed was likewise exposed at the base of the canyon, a little further down the stream, and was in a position where it was swept by high waters. This [fol. 119] coal bed where exposed was 1½ feet in width. The fourth bed of coal from the top was exposed in the Bluffs further down the canyon, further south and lower in position than the upper. In thickness, it was of a thickness of 2 feet 10 inches. It was exposed in the Bluffs in two or three places, probably not exceeding 100 feet in all; was not a continuous exposure. I could not trace those four upper coal beds through that district without prospecting. Outside of that locality I could not tell anything about the characteristics of those four particular coal veins, as to their uniformity and geological characteristics. I am referring to those above the lowest, as I have stated the sandstone formations in the coal-bearing crop between the various beds are not so pronounced, and are not so easily traced on the surface, so you can keep track of a particular bed, as in the lowest bed as mapped.

My testimony I have given about the continuity of the coal beds had more reference to the two lower than the higher one, and more reference to the lower one than any above. I cannot swear that I saw the coal veins in the upper coal beds, except in Coal Canyon. I saw coal beds elsewhere, but as I stated, in my direct, I could not certify that they were the particular beds. They were in the same position, relative position, in the rock section, that is, they occur within a certain range in the lowest bed. The only two beds that I could follow with a belief, and an opinion that I was following the same beds, and could identify, were the two lower ones, particularly the lowest. The position is just this, we have the lower bed, and that is traceable through the district by reason of its outcrops and by reason of its relations to the pronounced sandstone that stands out always practically through the field. The second bed is nearest that one, and it is one that is prospected. A bed in that position is one that is prospected more extensively than higher beds, because it is nearest the base of the canyon, and being nearer the lower one that is more easily traced. We can place its position when we find it more

readily. If it occurs 40 feet above the lower bed in one locality, if we find in the adjacent canyon, as in some cases, a bed in the same position, say 40 feet above the lower, we have better reason to believe it is the same one we saw before, because of its (relative) position.

I more particularly desire my testimony to apply to the lower bed on the question of tracing the identification of the same through this district.

I am not absolutely prepared to say that I identify any of the coal beds that I discovered in Coal Canyon at any [fol. 120] other place in that district as being one of the particular beds I had discovered in Coal Canyon, other than the lower bed.

The district covered in my direct examination commenced over by Castle Gate, and I have reference to those beds, and the beds between these points and the land in question. I do not precisely identify any of these beds as being the identical or particular beds disclosed or exposed in Coal Canyon. When I said that in my opinion these coal beds, other than the lower one, penetrated into and beneath the surface of the lands in question, it was merely by reason of the fact that as a geologist I had studied that formation, and I considered that all of this so-called coal measure extended on its dip down into the earth underneath this ground.

My examination of those five upper beds, taking them individually, was not sufficient to enable me to say that beyond all question each of the five upper beds of coal exposed in Coal Canyon had unbroken continuity from their respective strikes from said Coal Canyon to Castle Gate, and it is within the range of possibility that those five upper beds of coal may not have had continuity, unbroken, through that country, and in my opinion there is an unbroken continuity in the so-called outcrop of that bed between Coal Canyon and the extreme westerly side or boundary of the lands in question. That in my opinion, from the testimony given on direct examination, that lower bed with unbroken continuity upon its dip into the earth extends into and underneath the surface of all these grounds in question.

I said that in my opinion beyond a reasonable doubt this continuity of the coal bed from its dip extended be-

neath this ground in question. When I used the term "reasonable doubt," I wish to convey the evidence on the ground as to the presence of the coal for a distance north and south from the points of the ridge up the canyon a distance of more than a mile in the immediate vicinity of the land in question, and for a distance of nearly three miles in the district, some three miles west of the lands in question that the presence of this coal bed being determined, thus east and west, north and south to the south and west of the lands in question is conclusive proof of its continuity, and if it thus continues for that distance up to and in places immediately in contact with the lands in question why it should stop immediately at that point, and not continue for two or three miles yet, is beyond any reasonable doubt in my mind; in the mind of any reasonable man who would inspect the field. When I determined upon what a reasonable man would do there, that is a mere conclusion on my part [fol. 121] based upon what I would determine; other men with whom I was associated and whom I met there had observed similar—that is the basis of my statement.

From the fact that I found the exposures either natural or artificial that I have heretofore testified to at the places mentioned, I could see no reason why—that is no apparent reason why that coal bed should not continue without interruption beneath these grounds in question—that is the idea.

I have had what I consider considerable experience in the examination of coal fields. It may be that I have been fortunate enough to investigate coal fields where the beds are particularly extensive, and I have entered and investigated many coal mines, and in my experience in this field and in the coal fields of Oklahoma where I have worked most extensively, and in fields where development has been carried on to a considerable extent I do not recall a single instance where a coal bed of workable thickness approaching the beds that we have here, beds that were opened and entered upon and where mining operations could be carried on to a profit and to an extent where the bed was found to discontinue. Of course, there are places where coal of this thickness as found in this field would become thin and thick, and vary to a certain extent, and I have

been informed that there were places in those mines, though I was not fortunate enough to inspect them, where the coal did naturally pinch out, but it was simply a local matter. It did come out again.

I do not know the exact area, but a small area, that is a relative term "small area," I cannot recall the exact distance now, but the coal was found to be unprofitable in this instance, more especially because it became impure rather than the walls closed the coal out. That was merely information that came to me. I did not observed that. I have not seen veins of less thickness than this that did pinch out in these mines that I have examined, no, I have not seen veins of less thickness than these veins that have been worked to any considerable extent. These veins are simply prospected or worked locally near the surface of this country. In any fields that I have worked those physical beds are not operated—have not been so far; the time may come when they will be. I have not seen beds of this thickness pinch out to very inconsiderable portions, not below what could be worked that I recall. As to what I mean by "not below what could be worked," well, a bed of two feet in thickness could be worked all right. A bed of one and a half feet could be worked where it would be an eco- [fol. 122] nomical proposition and one that the ordinary conservative business man would undertake if he had to sink a shaft from two to three hundred feet to penetrate the coal bed, knowing that it was variable thickness and might be two and a half or might be less—depends on the circumstances. The circumstances that would enter into it would be as to whether there were other coals in that vicinity that were thicker and could be mined cheaper that would compete with this coal, or whether the market would demand his mining. There are coals of high grade of that thickness mined in some places extensively. This is simply my information from published reports. I do not know anything about it myself. I do not know of any place in this country, or in this district, we will say between Castle Gate and the lands involved—all of the territory of the lands in question, where anyone has ever sunk a shaft over five hundred or a thousand feet or more to work coal not to exceed two and a half or three feet in thickness. There

is not any shafting in this field that I know of. When I speak about the economic value of this coal deposit and the fact that people working at the coal on the outcrop would have to have these grounds in question to justify them in working their mines I placed that upon the height that their mining would be done from the apex or outcrop in the ordinary style shafting; either that or shafting. I would say as to the whole of these lands in question being coal lands from an economic standpoint, if they were taken undeveloped and with a knowledge that there was a variance, an indication of variance in thickness from ten feet down to something like two or three of the exposures, if to prospect the ground it becomes necessary to sink a shaft from two to three thousand feet deep, if the coal could be obtained only by sinking a shaft—could be mined only by sinking a shaft, I should judge it would be a profitable operation; provided, of course, the coal was there after you got there. There is very little indeed, if any, uncertainty as to the width the coal would be beneath these grounds in question. As to whether coal of economic value and thickness that would warrant removal of the coal. As to whether that is necessary is based upon the fact in my examination of those fields I have never discovered or seen the destruction of the continuity of marketable coal where there was an outcrop or exposure as large as I have testified to here of this lower bed. I have never seen indications of the destruction of the continuity, and my reply is based upon that. Whether if further examination by me of this field should demonstrate or disclose that one of the characteristics of the field is the lack of uniform continuity of those [fol. 123] coal deposits and that places where their continuity is destroyed, then there might be elements there that would cause me to change my mind upon there being no question—as to their existing coal deposits in the lower bed beneath the ground in question, would say if I had found evidence of discontinuity in this field either in surface exposure or in the prospect that element of doubt would arise. From my judgment I would say there is not any possibility that the continuity of those beds of coal might cease to exist, and not exist under certain portions and within certain

portions of the ground in question. My judgment is based upon my observation—there is not any possibility. Taking them together, there is not any possibility. There is not any possibility in my mind. That conclusion is reached by me by reason of what I saw in this field that I have already testified to; those particular things I saw in the immediate vicinity of this field that I have testified to. I do not believe there might be other elements disclosed there, or there might be elements absent from my examination that would enter into my changing my mind upon that possibility, I do not think so. If there were evidences disclosed at other places that I have not examined that indicate a destruction of continuity that might change my mind as to the possibility of the destruction of continuity under this ground, but there is not any other. Depend in the extent of that evidence I cannot imagine a condition being developed there that might change my mind on that. I cannot imagine—so that because I cannot imagine it, I say it could not exist. I wish to be understood that way, and that is based—the reason I cannot imagine it—is based upon the fact that there appeared to be continuity wherever I saw the coal exposure, and I have examined the field where there is any change of exposure.

I do not know of any other element that enters into it, if any, than that I have just mentioned. I do not know of a thing. As to the further fact entered into, that in my examination of the field I failed to discover any characteristic there that will permit me to draw a conclusion that in local vicinities the continuity of those coal deposits is destroyed. There is nothing to indicate that they are destroyed. As to whether, if I found there was a characteristic of that kind in that district that might be a factor that would assist me in changing my mind, I make the same reply—if that were possible. As I have stated, I have covered the whole ground; I cannot imagine such a thing being developed.

Q. Now, I want you to pick out, commencing at Castle [fol. 124] Gate, and describe, so that the same can be identified, each so-called prospect marked upon the map by a cross along this irregular line, indicating the two of three lower beds of coal as you testified to, one at a time, I want those.

—. Do you want to start with the mine at Castle Gate?

Q. No, I don't care anything about that.

Witness: The Northwest quarter of the Northeast quarter of Section 1, Township 13 South of Range 9 East. That is simply an opening where the coal has been exposed, but at the time the examination was made the coal had been taken out. I do not know who made that excavation, or when it was made—know nothing about it. The next one, Northwest quarter of Northwest quarter of Section 6, Township 13 South of Range 10 East—Prospect on the coal. There has been a large tunnel or slope driven in near the base of Willow Creek. I do not know who made that, or when it was made. In the Southwest quarter of the Northwest quarter of Section 6 in a branch of Willow Creek there were shallow prospects and some natural exposures. That mark indicates both, both prospect and outcrop as was testified to; exposures of coal. My legend says prospect, but it was so stated in explanation of the map; there were some natural exposures there and also prospects. Those prior ones to the ones I am not testifying to were prospects. There were three of these last that I will refer to. Well, they were prospects of natural exposure; coals exposed in the bluff, and they had also driven short tunnels. I do not believe they all were. As I remember, there was a tunnel or short drift driven into one place where the coal was exposed in the bluff. The others, I believe, were prospects. I do not know who made those prospects nor when they were made. There was no debris over it, except at the base. The face, as I remember, in the bluff there was sandstone projecting above and protected the coal. There was five or six feet of coal exposed. It was not highly disintegrated. As I remember, it was exposed to view for a distance may be 30 feet, something like that. The thickness of the natural exposure was five or six feet, as I remember. I first saw that natural exposure in 1906, as I remember it. I do not believe I know what its condition was as to surface debris or cover. Four or five, or six years before that there were heavy rains—may have affected it in the meantime. I don't believe it is within the range of possibility.

The next place where I saw a prospect or natural outcrop was the Northeast quarter of the northeast quarter [fol. 125] of Section 7, same Township. In 1906 when that

was examined there was a prospect there. It was a comparatively fresh prospect; I do not know just when it was made, though. I do not know who made it. In 1909 that was being opened as a mine.

The next was the Northwest quarter of the Northwest quarter of Section 8, same Township. Three prospects. I do not know who made those, and I do not know when they were made. There was not any natural outcrop at that point.

The next—there was a prospect or natural outcrop in the Southeast quarter of the Southeast quarter of Section 7. There were three prospect holes—well, there were two. These were practically on the line, and substantially pits dug there. Two of these showed the coal exposed. There was no natural outcrop there. In 1906, when it was examined, there was a man at work in the prospect; when he began it I did not know—I do not know who the man was that was in there prospecting at the time. He was employed he said.

The next was a prospect—small prospect—in the Northwest quarter of the Northwest quarter Section 17. I do not know when that was made, or who made it—that was simply a prospect.

In the same quarter section there were several other prospects. No, I beg your pardon, I will change that—in the Southwest quarter of the Southwest quarter of Section 8 there were four prospects at least. That is all I remember, I do not remember that because it is on the map—I remember it independent of that. I do not know who made those—there were some men working in there. That was in 1906. So far, all this testimony given now has reference to 1906 in reference to these outcrops. When I first saw them they were working one in the Southwest quarter of the Southwest quarter of 8 at the time. There was a natural outcrop of coal there at one place. It was in the southernmost prospect that was located. They were running a drift in on the coal from the outcrop. As to the length of the natural outcrop before any work was done, it was narrow, I should say not more than twenty feet. The thickness of the coal was about ten feet. The man who worked there the day I was there informed me his name was Harrison. I do not know what the condition of that outcrop was as being covered or otherwise two or four years

prior to the time you saw it. I would judge though, it was an old exposure from the appearance. That is, it was a [fol. 126] little spur. There was no rock immediately above that would tend to conceal it easily. At one time it was most likely covered. As to the coal, it was considered a disintegrate, not very fresh. I do not remember now that I took special note as to how far in that weathered condition existed in these holes, but I should say (probably) 20 or 30 feet. Of course, the change was gradual from the weathered outcrop to the fresh coal.

There was a shallow prospect in the Southeast quarter of the Southwest quarter of 8, that is (similar) to the others, simply a shallow prospect, no natural outcrop. I do not know when that was made, or who made it.

There were prospects in the Northeast quarter of the Northwest quarter of Section 17. I do not know who made them, nor when they were made. They were not being worked. I do not believe it was a natural outcrop.

In the Northwest quarter of the Northeast quarter of Section 17 there were two prospects. I do not know who made them. It was not a natural outcrop. I remember of outcrops in various places. In 1906 there was some work going on there I believe, I don't know just when it began —no showing of coal. There were some other prospects, but I do not know who made them. Disintegrated coal, mixed with soil, was found, Southwest quarter of Northwest quarter of sixteen. There were three outcrops or prospects in 1906, and more extensive openings in 1908. I do not know who made them. There were two natural outcrops at that point. Three beds there—the middle bed was exposed under the bluff to the extent of 30 or 40 feet.

The upper bed was exposed, that is, the weathered coal, The lowest bed the coal showed but not the full thickness of the coal. The presence of coal was shown, but not fresh coal. There were some weathered coal showed at the surface and other places between 1906 and 1909. There was a prospect near the center of the South half of Section 9, three openings there. Don't know who made them, or when they were made. There was no indication of coal, except the ash where it had been burned. An outcrop was found in Section 10. Same conditions prevailed there in 1906 and 1909. No one was working when we were there. I don't know who that belonged to. Mr. Ballinger of Price,

told me it belonged to him. That was on the lower strata. Coal was prospected in the Southwest quarter, or mined to a certain extent in the Southwest quarter of Section 10. There was a natural outcrop in Section 10 for a short dis- [fol. 127] tance. 20 or 30 feet I think. I never saw that exposure until 1906. I had been over the field, and made certain investigations in August, 1905. The prospect was there at that time, and the mine also. I did not measure any particular dimensions except just estimate them. I should estimate they were driven in the neighborhood of 100 feet, something like that in a northerly and westerly direction. There were two entries—after you passed into the mine there were two that might be called very large rooms, more westerly than north. As near as I can estimate now, it was near a quarter of a mile to the face of that drift or tunnel from the nearest point to the land in question —a quarter of a mile. When I saw that mine in 1905 the dump showed indications of coal recently removed.

Going back to Section 11, there were four prospects or outcrops I found there when I first visited the ground. I was there first in 1905 and 1906. When I was there in 1905 each of those four prospects were in existence. I do not know who made them, or when they were made. Afterwards one of them was being worked. I do not know by whom. In 1905 there was no evidence of recent work. A tunnel had been driven in—coal had been removed from it. I don't know how far driven in. It was not much more than a prospect. It would properly be called a prospect. Probably it was 30 feet long, something like that. My memory does not serve me very definitely on that.

There was an outcrop or prospect on the Northwest quarter of Section 14, same Township. I was there in 1905, I did not know who made the prospect, nor when it was made. There was not a natural outcrop—nothing more than indications in the soil, as I remember. That was a darkened condition of the soil, carbonaceous material.

I next found a prospect of outcrop in the Southwest quarter of Section 12, a couple of prospects, two of them. I do not remember whether I saw those in 1905 or not. I saw them in 1906. My memory is I saw them in 1905. I do not know who made them, or when they were made. When I first saw it nothing more than quite extensive indications of burning along the surface. The indication of burning

is quite extensive practically throughout the coal crops in the canyon, especially on the west side. Allred Canyon. There was more or less of that all the way from Cordingly Canyon to Allred Canyon, and extended back even north to Bull Canyon. The indication of burning is very common [fol. 128] all through that country we have just been testifying to about 12.

There was an outcrop near the north edge of Section 13, same township. I saw that in 1906, as I remember. I do not remember whether I saw it in 1905. I don't know who made it, or when it was made. There was not a natural outcrop there—I think this was a prospect. This special locality, as I remember, is not on this burnt area. I next found a natural outcrop or prospect in Deadman Canyon, in the South half of Section 7, in two places, both prospects. One of these the coal was exposed in natural outcrop. I do not know when they were made, or who made them. The dimensions of the natural outcrop, as I remember it, would be 30 or 40 feet in length. It was weathered to a certain extent; I think it was protected by a ledge of sandstone that stood above it a little way so that it was comparatively—you could judge as to the quality of the coal pretty well. Not mixed with soil, except at the bottom. As a rule in these natural outcrops the debris of the coal makes more or less cover at the base. I think that was the case here, and really destroys a close, definite examination.

From the conditions there I should say it would be apparent, about as when I saw it, for probably many years. Its protection above was sufficient to have kept it for a long time. I next saw an outcrop or prospect near the north edge of Section 17 in Township 13 South of Range 11 East, just one at this place. I do not know who made it, or when it was made. As I remember it, I saw it first in 1906. It was not a natural outcrop, a shallow prospect.

I next saw coal in Section 10, Township 13 South of Range 11 East. There were coals exposed there in seven or eight places. Several places there were two or three excavations there. They were not all on the lower bed. There was one, as I remember, on the lower bed. There was also, as I remember, two. The coal was exposed there in an outcrop showing weathered coal, not a full section, however. That was a prospect on the lower bed; natural

outcrop also as I have stated. I do not know when the prospect was made, or who made it. It had been made some time. The outcrop of the lower bed in Coal Canyon showing weathered coal was 20 or 30 feet probably. That was upon the dip of the bed, or substantially so on the side. I do not know when the other outcrops or prospects were made, or who made them. They were on the overlying beds. [fol. 129] I saw a natural exposure—there was an outcrop in the adjacent Section 3 on one bed, that is the highest bed; that was a prospect. I do not know who made it, or when it was made.

At this place, as I remember, there was weathered coal showing where the outcrop had been made, that is on the sides large exposure of coal, natural exposure, as I remember. I now speak of the exposure in Section 3. That is on the highest bed we found in that locality.

We next found a natural exposure near the east edge of this crop in Section 13, as I remember. I haven't got that marked here. I observed that in 1905; it was in the bed in the stream; in 1906 it was not exposed. I cannot say what condition that was as to being exposed or not from 1900 up to 1905. It was in the bed of the stream.

In going east of this the next location is in Soldier Canyon, Township 13 South of Range 12 East in Section 18. The northeast quarter of Section 18 there were some prospects, couple of shallow prospects on the coal. I do not know when they were made, or who made them. That was investigated only in 1906. It has not been since 1906. I do not remember, but I believe there was not a natural outcrop there showing the coal, except the debris of the coal probably. I do not remember very well about that. There may or may not have been. I made the measurements there. I did not give this in my direct testimony. We did not go as far east as that. Some of those were made in 1905, and I haven't my note book of 1905 here, but in this from memory I can give pretty well. The two prospects in 18 that I testified to showed the presence of coal. It did not show the full thickness of coal. Those two were on the lowest bed, and they were old, shallow prospects, and had fallen down, and the coal did not show well.

The next occurrence is in the Southeast quarter of Section 7, same Township; which is on the highest coal above the base. Short tunnel driven in there on the coal. That

was 2′ 7″, I think. I do not know when that was made, or who made it. It was not a natural prospect, an old prospect.

The next is in Fish Canyon in the Southeast quarter of Section 20. There was one opening there. I do not know who made it, or when it was made. It shows a prospect, showing partial exposure of coal. That was considered to be on the lower bed. Part of it had been burnt, as I remember. There was nothing except the indications of burnt coal.

[fol. 130] In Spring Canyon in the Southwest of 21; another in the Northwest of 21; the Southwest of 21, the conditions there were essentially those in Fish Canyon—showing partial exposure of coal. As I remember there was some burnt coal. I do not know who made it, or when it was made. It did not disclose the full thickness. There is another one in the Northeast of the Northwest of 21. This prospect in Spring Canyon, this locality, there is a prospect showing 5′ 8″ of coal. This is on the bed above—one of the beds above the lowest bed. I do not know who made it, or when it was made. I saw it, as I remember, in 1906. It was not a natural exposure. There is a prospect there.

The next prospect or outcrop is in Dugout Canyon in the South half of Section 23. There is a prospect, that is the bed above the lower, above the base. I do not know who dug it, or when it was dug. That coal area is burned in that vicinity. I have no note of its being burned at this immediate locality. The upper part of the bed was concealed. I only saw the lower part. I would not say that the whole area is not burnt at that place. I saw there are not indications of burning throughout the whole extent of the coal. I have no note of the coal being burnt at that particular place. I would have it.

The next is in the same canyon in the Northwest quarter of Section 23, as I remember, there are three openings. I do not know who made them, or when they were made. They were old prospects. There were two coal beds there, one on the lower and one 60′ above. The lower bed of coal was 9′, and the upper bed 9½′. The lower was on a natural outcrop. That outcrop was short, not exceeding 50′. I should think it was on the strike pretty near the

base of the canyon protected by the overhanging bluff—none of it burnt.

The next is the exposure in the Southwest quarter of Section 19, in Township 13 South of Range 13 East. There are three exposures there. Well, there were four prospects in this locality, and one of these on the lower coal. They were all shallow excavations, shallow prospects. The lower coal showed 5′. The coal was burnt, indications of burning extensive along this vicinity.

I do not think that is true as to the lower bed. I have no note of it. Possibly it may be true, and I have not a note of it. I do not know who made these openings, or when they were made. There were indications of being old is all I can tell. They were not fresh, not recent. Showed the effect of the atmosphere, the weathered rock had fallen in. I cannot tell by looking at a deposit like [fol. 131] that how long it took to accomplish that result.

The next exposures were at—were in Rock Canyon in the Southeast quarter of Section 30. One at this location. This is a bed above the lower bed—125′ above the lower. It was a shallow prospect exposing about 3′ of bed. No reference to a natural outcrop. I do not know who made it, or when it was made.

Next is the Southeast quarter of Section 32, same Township. There is a prospect in 29. The prospect in 29 I have indicated apparently the presence of coal; I have no record of the thickness of the bed there. I do not know who made it, or when it was made. I believe it was on the lower bed. That is my memory.

Next is the Southwest quarter of Section 32, Northeast quarter of Southeast quarter of Section 32, and in the Southeast of the Northeast of Section 32; two prospects near together. Those are prospects. I do not know who made them, or when they were made. It is on the lower bed as I remember, 5′ 10″ of coal.

The next is in an unsurveyed Township. At least it was unsurveyed at the time.

Taking those sections I have just given recently, I saw those—the last named I saw in 1905 or in 1906. Those in Sections 29 and 30 in Township 13 South of Range 13 East, I do not believe I observed those in 1905. I think they were located in 1906.

Referring again to the prospects in unsurveyed Township 14 South of Range 13 East, those prospects were seen in 1906. There were three beds exposed there. I located five prospects. I do not know when they were made, or how old they were. I do not know who made them. They were on three separate beds, those prospects were. Being in unsurveyed land they were not located.

The next would be at the mines at Sunnyside. I started from the extreme westerly end of the map portrayed by Exhibit 1. I have not stated all of the facts from which I have drawn my personal conclusions that the coal bed outcropping along the line indicated by the irregular, crooked line representing the lower bed as appearing upon exhibits both 1 and 2, existed beneath the surface of the lands in dispute. Certain facts as to the extent of the indications of coal by burning, I believe, have not been brought out fully either in direct or cross examination. That was [fol. 132] one of the facts that pointed directly to the continuity of that coal bed, to the original continuity of it along near the surface. I considered that fact as an element in arriving at the continuity of the coal bed along the surface, as well as other beds, of course. Evidences of burning were particularly pronounced in what is known as Panther Canyon in Sections 6 and 7, Township 13 South of Range 6 East, more particularly upon the north side. Indications of burning were pronounced also on the south side, especially on the points of the spurs in Section 7, same Township, and extending over into Section 12 of the adjoining Township 13, Range 9 East. Evidences were also present along the cliffs in the North half of Section 18, 17, and 16. These evidences were more pronounced on the spurs and points where the coal had a lighter cover. Indications of burning were also pronounced in the East half of 16 and the South half of 9, and in the West half of 15 on the same Township. In the East half of 16 and West half of 15 particularly. Indications of several of the beds having been burnt were pronounced. The same indications were present in Section 14 of the same Township and in Section 13 in Allred Canyon. The indications in these locations were especially pronounced in those slopes that face toward the south and towards the east, and as the coal outcrops approach the bases of the canyon the indications of burning were less pronounced and rarely occurred where

the coal really reached the bases of the canyon. The same indications were pronounced in the extreme East half in Section 13, and in the West half of Section 18 in the adjoining Township 13 South of Range 11 East. There were indications of burning on all of the principal spurs that lie between the canyons in Sections 18, 17 and 16 in this Township. There were evidences of burning in 15 and 14 near the extreme southern edge of the crops. In Section 14, especially, the canyons did not extend into the coal area very far, and for the most part the cover, as I remember it, was heavy over the coal. The indications, or the real evidence of burning were shown in the baked character of the shales, and sandstones that originally occurred immediately or near above the coal bed, and where there were fresh exposures you would get indications of ash of the coal where it had been burnt. There is a way by which you can tell approximately how far down on the dip this coal was burned where you find it was burned at the outcrop. I will state in the first place that at the present time there is not known to be any burning in this district. There are not any indications on the ground that there is any burning.

I examined the Independent Coal & Coke Company's mine—Section 16. I did not see any indication of burning [fol. 133] in that Section. Of course, there may be evidence of that in these principal spurs that have considerable width, for instance, as the spur between Cordingly and Allred Canyons, which is something like half a mile in width; and the same is true of the narrow spur between Cordingly and Bull Canyon in the West half of Section 15. There are many minor gulches or canyons tributary to the large canyons, and in many of these the comparatively recent erosions had removed the rocks back so that the indications of burning would not be found back in these angles of comparatively recently erosions. That is on the points the works would show the indications of baking and burning or the change of color, the hardening of the strata, whereas back in these points (one view) hundred feet there was not evidence of burning in the change of color of the rocks and in the apparent burning of the rocks which would indicate to my mind that the coal there had not been burned, because where the coal is really burned, and where it is positively known the rock is baky and metamorphosed and in the cracking of the rocks and the collapsing of the coal;

when being burned there is more or less breaking down of the overlying beds which are also apparent; but the chief indication is in the change of color and in the baking of the supra-incumbent rocks at the coal beds of considerable thickness as they are in that district.

I did not see the rock immediately overhanging the lower bed of coal very far between Cordingly Canyon and Bull Canyon, because it does not extend very far. The slopes are comparatively steep between the lower bed and the next bed of coal above it, and you can not see them very far.

I did not see disclosed by reason of these smaller canyons and washes, the sandstone or rocks immediately overhanging the lower bed of coal more than a few hundred feet at most. In that case I was referring to the smaller gulches that were coming down. If you take it from the extreme point northward along the crop it would be in this case a distance of half a mile. The smaller gulches come in from the side that you see indicated on the map.

These smaller gulches did not at this special locality expose the lower bed of coal in there—on the points of the ridges the rocks were burnt, but back in those points the rocks occurring immediately above the face of the coal bed were not burnt. I am sure the bed of sandstone in any of these coal gulches was actually in contact with the coal, [fol. 134] because not a mine up there which is not actually in contact with the coal; the sandstone that lies between a space of 40′ above between the first and second beds. My idea is that if the coals had burned back any considerable distance that the entire geological strata through there, the coal strata or measure would show the effect of the heat a distance of 40′, at least, that is certainly true in that field. I examined that closely for that purpose. I did not see any signs of heat at the surface at all there. I was within 40′ vertically above this lower strata of coal. I could not state in how many places I got within that vertical distance of the lower bed of coal. A great number in fact, because a crop was followed along from that distance so I say, in a great many places. I did not at that time find any evidences of burning at the two beds testified to by me. In the Southwest quarter of Section 10, Township 13 South, of Range 10 East, not at that special place at all. I did find at the three points testified to by me in the Southwest quarter of Section 11, same Township. The northermost pros-

pect, there is driven in on what appeared to be the burnt edge of the coal. There was nothing above that that I could examine to determine what the extent of the burning was, except that the rocks for some distance above this coal, which is one of the upper beds, showed strong indications of burning; the rocks were fractured and broken, so far as I could see, in that vicinity. The rocks showed strong indications of burning. I saw no indications of burning at the point testified to by me in the South[illegible]st quarter of the Southwest quarter of the same section. As to the indications of burning appearing in the Southwest quarter of Section 12, same Township and Range, there were indications of burning abundantly along that locality. I could not tell the extent of the area upon the dip of the coal that had been consumed by burning in that locality, because the face of the hill there was comparatively straight. As I remember, there was but little, if any, indication of burning at the point appearing in Section 13, same Township and Range, upon the north section line, almost at the quarter corner. I believe there is an exposure of coal there that was not burnt. I am not really clear on that. I do not think it may have been burned there, the same as it was at this other place.

At that locality—at that immediate vicinity of that prospect, there is no indication of burning, and the coal exposed was 4′ exposed in that prospect. There is not any indication of burning at the two points indicated in Section 7, Township [illegible] South of Range 11 East. There is no indication of bu[illegible]g in the immediate vicinity indicated in Section 17, same Township and Range, and the coal is 8′ 4″ thick on [fol. 135] this prospect referred to near the north edge of Section 17, Township 13 South of Range 11 East. There is no indication of burning in the immediate vicinity of Section 10 or 3, same Township and Range. I had to make a close study of the formation to be able to determine what consideration had to be given to that burnt area in determining the continuity of the existing coal deposits. I made as careful a study as I could, under the circumstances, of the burnt area.

I have learned from my professional and scientific studies that by observation in mines where coal has been burned, and where coal has been prospected in on the edge of the coal extending through the burned area in some places to the exposure of coal burned either partially or fresh, it af-

fected the overlying rocks in changing its composition by the heat of the burning coal. In certain cases it partially metamorphoses them, that is, made them harder as the burning of brick, and in other cases in naturally melting the rocks. The first changed condition appears to the eye in a change of color in the rocks.

When I first went into this field I was instructed directly by the chief geologist of the United States Geological Survey, Mr. C. W. Hayes—that was in 1905. Those instructions were verbal. The instructions he gave me verbally were to report to the special agent in charge of the General Land Office in Salt Lake, and to cooperate with him in the investigations of "certain alleged coal lands" in the State of Utah. I was in the command of the special agent so far as to localities. The instructions given me by the special agent were oral. The special agent accompanied me in the field a large part of the time, and he had plats indicating special lands that were desired to be investigated. The chief geologist did not tell me that he wanted me to go into the field to classify public lands. The special agent did not use that term. His desire was, as expressed to me, to determine whether certain lands that he had under consideration were, or were not, coal lands. In that sense classify them, of course. I first learned that these particular lands had already been classified by the Commissioner of the General Land Office and appeared upon the plats as classified in the local Land Office in Salt Lake. When I came to Salt Lake and investigated the special areas and plats covering the areas that we had under consideration, I was informed by the plats that certain symbols on these plats indicated that the surveyor had classed those as coal lands. Not all of the plats, as I remember, which I did see in the Land Office, showed that these particular lands in evidence had already been classified by somebody. I do not remember whether those lands that were indicated as coal lands on the Surveyor General's plat included any special part [fol. 136] of the lands that were investigated. The special agent did not say anything to me upon the manner or means by which I should determine whether lands were coal lands or otherwise. Until after I began work I did not know that, under the rules of the Department of the Interior and the General Land Office of that Department, that only those lands were coal lands upon which an exposure of coal

existed at the time of application for classification, but before I undertook to determine what the character of these lands were I was so informed. This was in the year 1905. It was also the rule of the General Land Office laid down generally prescribing the method by which the character of the lands should be ascertained. Based on my information, I was laboring under the opinion that there was a rule of that kind at the time I made my examination and subsequent report.

In a communication that I wrote to the Director of the Geological Survey, bearing date September 5, 1905, in reference to this subject, I used this language, "I beg to inform you that there is a rule in force in the State promulgated by the Commissioner of the General Land Office, that lands cannot be classified as coal lands unless (commercially) valuable coal is exposed in each legal subdivision of forty acres proposed for sale. To this ruling the United States Land Office and the State Land Board have been, and are now, subject."

As I remember it, that statement was based upon information which was given to me by Mr. G. E. Hare, a special agent of the General Land Office, located at Salt Lake City. He is the same agent to whom I was sent with instructions to act under his directions. I did not know that these lands had been classified and were open to entry as non-coal lands by the government when I came into the field. I first ascertained that there was a rule laid down by the General Land Office and the Department of the Interior as a basis upon the classification of lands of the public domain as to being coal or otherwise in 1905. I got further information in regard to that subject when I received a reply from the Department in Washington to my communication to the Director of the Geological Survey. That letter was from the Chief Geologist of the original survey. I do not remember anything in particular in regard to it, except to show that the letter that I had written had been effective in producing certain results. The result I was trying to produce was to start something in the direction of removing such ridiculous rules in regard to the classification of coal lands. I had information that under the rules and regulations of the Department of the Interior and the General Land Office, as stated in my letter, "that lands cannot be [fol. 137] classified as coal lands, unless commercially

valuable coal is exposed in each legal subdivision of forty acres proposed for sale."

As to having the rules changed, I had not formulated a set of rules in my mind that I now remember that would cover completely what I considered to be necessary in classification of coal lands. My intention was, as I have already stated, to have criteria upon which lands are classified as coal lands extended from nonsensical rule to a reasonable rule based upon the evidence that might be found in any case in investigation of coal lands. The information I had with respect to the rule I assumed to be correct, but as to whether that was, in fact, the rule I had no information. The chief reason why I considered that rule, which I understood to exist to be nonsensical is, that if lands that can have coal shown and exposed upon them are to be the only lands that are to be considered coal lands, the matter of classification of coal lands would be at an end. In other words, here is a legal subdivision of coal containing coal outcropping upon it near its edge, according to the regulations that legal subdivision is coal land, within a few feet it may be, within the range of a few hundred feet and much nearer to that outcrop of coal than much of the lands contained in the legal subdivision. There are other lands that do not contain coal lying in juxtaposition with the coal outcrops, that you cannot class as coal lands, and you can see on the ground and surrounding this special tract, as is found in many cases; coal cropping out extending under, just in the same sense that the floor extends beneath the carpet, and there you are prohibited from considering that as coal land according to such supposed regulation.

It must have been in the early part of 1907 that I made my classification upon these lands in question, and did not determine whether or not these lands in dispute were coal lands until that time. I made report to the Director of the General Surveyor presumably, I do not remember now positively, whether these special areas were transmitted in that way.

In my letter or report I said in substance that lands not outside of legal subdivisions should be classed as coal lands if evidence bearing on the fact were present.

Before my final classification of these lands I made up my mind as to what elements should enter into the question of

whether they were coal lands or otherwise. I took into consideration the first thing, the quality of the coal. In the second place, the number and thickness of the coal beds, in coal beds individually, and the beds collectively found in [fol. 138] the rocks, and from these facts determined the extent of these beds in any special area. These elements known, there would be no (different) in classifying coal lands.

One other (element) that might have been considered was the depth at which the coal occurred under any special tract, and of course, that involved the problem of possible or profitable mining of the coal in those lands, if it was determined in any case that though the coal may be ever so thick and good in quality, if, for any reason, it was determined impracticable from an economic standpoint to mine that coal, it would not be classed as coal land. As to one of the elements I took into consideration being a present and future condition and not a past one, I hardly know what you mean by a past consideration. I said it involved the problem of profitable mining as a present and future proposition. No past condition would enter into my mind, because you cannot control the past as to its being simply a question of what conditions you found surrounding it at the time you went there, and the future, and not a question of what the conditions were that surrounded it two years or four years or six years prior to that time; if there has been development of that field that development would give you information, of course, speaking of the problem of being to work it profitably, that was one of the elements I took into consideration; the present condition does not mean this month or this year. It means what has been in force in this country. The present for that purpose would extend to the time this country was occupied. The conditions have not materially changed in that time as regards a market or method of mining. As to the methods of mining I think it has not materially changed since 1849 and '50. Of course, market increases as the population increases, and as development increases. I do not think the element of market would enter into your determination here. The element of market would enter into the market of valuation of the coal lands, but it did not enter into the question of whether it should be classed coal land or not. These are the principal elements that were considered by me. One

was the quality. I thought the quality was all right. Another was the thickness, another was the extent of the beds in that particular area or region. When I speak of the beds I mean the beds of coal revealed in that district through information gained in any way whatever that is competent in the determination of coal propositions.

I would consider the land as coal land if the evidence on [fol. 139] the ground pointed to the widespread continuation of those coals, and that they were beneath those lands in a depth within the range of practical mining.

I might state in explanation of my classification, that the expression "classifying" has been used. Members of the Geological Survey who survey and submit evidence for classification of coal land, that land is not classified until approved by a competent board of his class after receiving all the information he has; after it is approved by a group of men of this class and submitted to the Department.

I submitted the proof and that it was now classified. I do not know what was done with the proof after I submitted it. It was examined, and transmitted to the Department of the Interior. I do not know the committee that examined it. The matter is not considered by the Secretary of the Interior; that is wholly in the hands of the Director of the Geological Survey. There was a regulation in force in the Geological Survey giving the criteria, or procedure, you might say, determining what are, and what are not, coal lands. It was a typewritten rule that I had. It was among my papers on file in my office, and when I severed my connections with the Survey my material was considered to belong to the Department. The rule specified the thickness and quality; the coals should be of certain grades to fall within certain classes of coal. As to its being exposed on the ground that is left entirely to the man who submits the information to have the lands classified. The rule was adopted, I think, some time in 1906. I think I had no rule before that time, so that before that time every man that was sent out to do work had to depend upon his own judgment what elements ought to enter into the classification of lands. In fact, there had been no classification of lands.

I do not wish to be understood as saying that I know there had been no classification by any other Department of the Government—I do not know anything about that.

On Exhibit 2 I have placed an irregular red mark following legal subdivisions from the westerly and almost to the extreme easterly end, which I have made as representing the southern limit as to what I classified as coal lands, but I am not now able to state whether that is correct in detail as to what was finally promulgated by the Land Office.

I classified these lands as coal lands approximately to the line indicated on the map by the road crossing the northern halves of Township 12 South, Ranges 10 and 11 East. The [fol. 140] letter "A" represents the westerly end of the road; the letter "B" approximately represents the easterly end of the road I refer to.

Some of the other members of the geological survey and I got together and arbitrarily determined that 3,000 feet below the surface of the ground should constitute that ground as coal land. That was an arbitrary depth. It was all available information in regard to our own observation and our knowledge from publications on mining and things of that kind. It was considered that 3,000 feet was a reasonable limit for the practical mining of coal, so that other members of the Geological Survey and I assumed to ourselves the right to determine what a reasonable depth should be. No other members of the Department were competent to consider the matter in that light. It had to be an arbitrary line fixed. It was not earlier than 1905. Prior to 1905 the Department never classified any of these coal lands, and if they were classified they were classified by some other Department of the Interior. The matter came up to us as a matter of our duty in the Geological Department in 1905, and I took it as an arbitrary proposition and undertook to formulate rules and criteria, and all that, for the determination of the classification of lands, and this classification in reference to these lands now in controversy is the result of these rules and regulations laid down by our department in 1905 or 1906. When the party went out to run the lines I saw some of the lines run. The field notes were in charge of a surveyor of that class of work, Mr. J. E. Chapson. He had copies of the original field notes, and as I remember he had these copies of the original field notes with him.

Tuesday, January 13, 1910.

Cross-examination of J. A. Taff resumed.

By Mr. Edwards:

I do not recall any note indicating on the map the outcrop of coal known to be upon any of the lands in question, and I have no recollection independently of my notes. I am not prepared to testify as to any discrepancy between the field notes and the measurements actually found in the fields. All I know is hearsay. I did not examine this coal belt or measure to any greater extent than is indicated upon the maps, Exhibits 1 and 2. The maps marked Exhibits 1 and 2 include all of the area examined between Sunnyside and Township 13 South, of Range 9 East, and that includes the mines and town of Castle Gate. From Sunnyside surveys of the same character were continued southward for a distance of some ten miles into what is known as Horse [fol. 141] Canyon in Township 16 South of Range 14 East. Then from the region indicated by the west end of the map, Exhibit 2, the same character of work was continued to the southward through the sectionized portion of the Wasatch plateau as far south as Township 13 South of Ranges 5, 6 and 7, also the north end of Huntington Canyon, and through Pleasant Valley, which lies directly west of Castle Gate, a distance of about eighteen miles. In my opinion the examination I made southerly from Sunnyside was upon the same coal measure as that I have encountered in the vicinity of the lands in question. The coal measure that I examined westerly of Castle Gate for eighteen miles was upon the same coal measure, though I will state here that that examination of the coal measure was not continuous from Castle Gate to Pleasant Valley.

In order to reach Pleasant Valley you are required to pass over a high ridge having a width of some six miles. The coal measures of Pleasant Valley are separated by that ridge from the other, but it is in the same character of rocks, and the same character of coal in Pleasant Valley as in Castle Gate. The series of coal strata and docks that bound them is called the coal measure.

I did not undertake to determine what the direction of the dip was, and rocks are nearly horizontal. There is more or less land folding of the country there.

We did not run precise levels and take the horizontal elevation or the difference in horizontal elevation between this coal measure and the Castle Gate coal measure from that in the immediate vicinity of the lands in question. The true strike west of the fold would be along the Wasatch plateau, west of Castle Valley. The absolute strike has not been determined. Approximately it is north and south. The dip is a little west.

There is a fold off in this country south of Sunnyside. Of course, that fold is south of Sunnyside. Now, you understand that this fold of which this field that we are considering, these parts of the field that we are considering, as shown on Exhibits 1 and 2, this is the north and as far as we are concerned here of a very large fold and the central part of that large fold is in what is known as the San Rafael Swell, which lies to the south of Price River. Roughly speaking, if you mark the axis of that fold extending northward from near the San Rafael Swell, you would pass through this district we are considering here, and this is on the northward pitch or the northward dip [fol. 142] of that fold—you understand it is—taking Sunnyside as one termini, and Castle Gate as the other termini, the true strike of that coal measure, taking that as a whole, it would be a little east of north. The true strike is north of west and south of east a little. Well, I should estimate approximately, Oh, on the whole about between five and ten degrees north of west.

Q. Will you kindly take a ruler and place it upon Exhibit 1 where you estimate to be the true strike?

A. On Exhibit 1?

Q. Yes. Draw a line there or mark a line showing what it is.

A. That is the estimated or probable strike.

Witness: When I say that is the estimated or probable strike, I refer to the lead pencil line starting in Section 18, Township 13 South of Range 10 East, which point is marked with the letter "c," and continuing and terminating in Section 17 of the same Township in Range 11 East marked by the letter "B." The true strike in my opinion of that measure does not change materially between the letter "C" and the Castle Gate mine.

The point where the outcrop goes under cover in Allred Canyon I would consider (yo) to higher in elevation than

where it goes under cover in Castle Gate. We did not run a line of levels on that line. Well, I would estimate that the outcrop of coal in Allred Canyon was between two and three hundred feet higher in elevation than the outcrop similarly situated in the Price River Valley at Castle Gate. That it is an estimate, it is an estimate based upon the strike of the rocks as nearly as can be determined in that distance, that is assuming the strike of the rocks a little east of north. The dip is east of north.

The strike is a little north of west and south of east.

If the strike is as I have estimated on the map then the coal crops further west from that line of strike would be at a relatively lower elevation. The crop in the valley in the vicinity of Castle Gate at that strike would be in the neighborhood of a mile further north than it would be in Allred Canyon, and taking the dip and the strike I simply figure it out by per cent that is simply an estimate. I say it could be determined only by precise levels which was of little profit.

I do not contend that this estimate is anywhere near accurate, except that it is somewhere within the range of accuracy, provided my strike is correctly estimated. Assuming that I have correctly estimated the strike, then the vertical elevation of the coal measure at Castle Gate is from 200 to 300 feet lower than it is at Allred Canyon. One degree of error in the estimation of that strike wouldn't make [fol. 143] much difference in the elevation between those two points.

I could not tell how much unless I had a protractor. I cannot estimate within a degree what the strike is. I can estimate it within five degrees of what that strike is—from the strikes I put down on the plat I can estimate. I don't say that the strike indicated at the line that I put down is within five degrees of what the true strike of that coal measure really is. I do not say it is absolutely within that. I will say it is within ten degrees. I will say it is between five and ten degrees, I think so. How much difference in elevation five degrees would make between those two points in variance in the strike from what I have laid down depends upon which way you put the variation. If you put it one way it will be one thing. Putting it north in the first place, the northwest and southeast, making a mere estimate in this case, probably a (different) of 50′ in height.

If it is shifted so that the strike is more northerly on the west it would be less. As to whether I am prepared to say that at any place where I made these examinations that I have testified to that I saw that coal measure at a vertical elevation and a lower entered further below where it outcrops in Allred Canyon then the place where I saw it in Castle Gate, in the area shown on Exhibit 1, or where I take it into consideration in determining the (probably) geological condition existing beneath the ground in question;—I think that in the vicinity of Castle Gate there it was as low a point as I observed it in the vicinity of the lands in question. Taking the dip which I have given of the coal measure it would be 50 or 60 feet lower in vertical elevation where it enters beneath the lands in question in Section 3, Township 13 South of Range 11 East, than it is where it is last exposed in the nearest proximity to that ground. At the point where it first enters cover on its dip where it enters under Section 33, 34 and 35 in Township 12 South of Range 12 East, it would be 120 to 150 feet lower in elevation. According to my idea, if that coal measure extends on its dip underneath the rest of these grounds the dip would, of course, increase the ratio about five feet to the hundred. That is approximately true *so* as to this whole area here, so that by taking the distance from any known outcrop or exposure and figuring the surface distance from there to any given point on the surface, and taking this coal at this place it will be about 5 feet for every hundred below the outcrop. It will be about five feet for every hundred of horizontal distance you would travel to the point, approximately, yes.

[fol. 144] The first sandstone is Castle Gate; the Castle Gate sandstone is on the average, the vertical elevation taking the lower side of the sandstone 600 to 700 feet, so that to the difference in vertical elevation between the outcrop of the coal and its position under the surface of this ground at any given point, must be added about 700 feet to determine what its vertical elevation beneath the surface is, between the bottom of the Castle Gate sandstone and the beds of coal on that line. When the work was done I determined the approximate elevation in the cliffs by the use of an aneroid barometer. That gives pretty close or approximate results. That was platted on the map I had with me. I haven't it here with me, so I will have to assume

from memory I should say the vertical elevation between the face of the Castle Gate sandstone and the top of the cliff—a vertical section would be approximately 1500 feet, so that the difference in vertical elevation between the coal measure and the crest of the plateau is approximately 2200 feet.

I beg your pardon, to determine whether the coal exists between the surface of any ground upon which the plateau, if such, exists, it would not be necessary to add 2200 feet to five feet for every hundred feet in horizontal distance you travel from the coal measure to the place where you want to find a vertical depth of coal beneath. This estimate of thickness is the thickness of the rock and not the vertical distance on the ground between the two. Of course, that would depend on where you would take the point on the sandstone and the point on the cross section, as to how far the vertical distance would be. I cannot give the average vertical distance from the underside of the Castle Gate sandstone to the crest of the plateau, as you climb the hill. It depends on where—because the range of the outcrop of the Castle Gate sandstone on the ground is through a mile or more, in the direction of the crest of the plateau. It is approximately by one geological formation, that formation, some sandstone, some limestone and some shales. Along from this particular section in controversy, that is the case. The formation contains all of those rocks. Speaking now right at the crest, some places limestone and some places sandstone. There is sandstone on both sides. The limestone some places might be older and some places younger. The erosion of the crest of the hill is such, so irregular that it exposes sometimes limestone and sometimes sandstone. I don't know whether it is all the same line along the crest. It might be, and it might not. There is evidently more than one bed of limestone near it. I have no name for that sandstone that appears upon the crest of the plateau. Those are thin sandstones comparatively. I [fol. 145] don't know whether it is the same sandstone that outcrops there at all times or not. To give approximately what the average vertical depth or thickness of that formation is between the bottom side of the Castle Gate sandstone and the crest of the plateau, the approximation would be extremely rough. I gave approximately the average declination, the degree of that declination the other day, but you will observe on the map that the position of the Castle

Gate sandstone on the surface ranges through a distance of more than a mile. I gave the other day what was the average declination of it. I did not give the depth of the face of the hill, the erosive face. I did not give that, not that I remember. That varies. The average slope from the bottom of the Castle Gate sandstone to the top or crest of the plateau is more difficult than the other. It ranges from, I dare say, 10 degrees to 25 degrees; it depends on what point you take it. As to the highest known sandstone there about the Castle Gate sandstone I have identified and have a name for its identification, I have none. I cannot give the strata commencing with the Castle Gate sandstone, the thickness of the same from the bottom of the Castle Gate sandstone to the nearest crest of the hill on the plateau—a section of the rocks with their average thickness. I cannot do it. The Castle Gate sandstone is estimated at about—Oh, we will say 500 feet, the top of the Castle Gate sandstone is difficult to tell. Covering the Castle Gate sandstone there are some shales chiefly, and some lime and sandstone strata. I do not know what is the thickness of those. I have not seen the exact limit; it is in the slope of the hill. As to the extent of it so far as I saw the limit, well, in my estimate I have seen the shales exposed probably 100 feet or more. The raise formation was not disclosed.

There was some soil there, I did not take the thickness of it because it gave me no definite information. I have no judgment at all on that, nor observation on that because those rocks were very poorly exposed; some places you would get an exposure of 10 feet, and in other places you might get 100 feet and—as near as I can estimate them the distance of the thickness of the formation between the top of this 100 foot body of shale as disclosed and the top or crest of the plateau where it appeared nearest—the distance at the slope—it depends on where you started up the hill. From the bottom of the Castle Gate sandstone up to the crest of the hill the vertical distance—I have been giving the thickness of those beds. From the base of the Castle Gate sandstone—well as I remember, I gave that a while ago as approximately 1,500 feet. When I say 1,500 feet I mean that is the vertical thickness of the rock, and those rocks are all dipping on the sandstone at the same degree of dip as the [fol. 146] coal measures—Yes, sir—Now, this is a vertical

section of the rock, you understand. The face of that declination of surface from the crest of the plateau down to the coal measure constitutes the (hypothenuse) of a right angle triangle any line might constitute the (hypothenuse) of a right angle triangle. A horizontal plane drawn through the outcrop of the coal in the coal measure. I haven't in my possession any figures by which it can be determined the vertical distance between the surface at any given point on the plateau to that horizontal plane last referred to. The elevations of that plateau were taken. Those are on the print that I referred to that were used in the field which I have not now. It is my memory that I left it here with the special agent of the Land Office who was with me in 1909. It was Walker, so I have no means at my command at this time by which I can tell the vertical depth beneath the surface of any of the coal in this ground in dispute. It would be impossible, except to run precise levels and under the circumstances of a low dip like that, why, an approximate is as good as you can do, since the dip was quite low. The difference in the depth from point to point having approximate elevation of the plateau could then be determined, but I have not that data. I did examine a large part of the surface of the ground in question. There was very little covering of soil over it, that portion of it on the plateau. When I say "very little" I mean except in limited valleys where some of the streams that are indicated on the plat run across these lands, the outer soil hasn't any depth at all. There was some soil mixed with rock. The rocks were plainly apparent. The rocks, debris and detritus, generally small and broken disintegrated stone. I looked for signs of faulting in that formation. I did not see any, any faulting in a geological formation that did not appear on the surface of the ground, it did not appear on the surface; unless you did some mining or exploration you could not determine. There might not have been any faulting in that formation without my discovering it, not to any extent. I mean by "not to any extent" because throughout these lands practically the erosion has exposed the edges of the various rock beds here and there so that they can be traced, and it was an easy matter to determine if those beds had been displaced by a faulting. I am now speaking of exposures that I have heretofore referred to as outcrops on various sandstones and various shales. Those exposures

extended along the various gulches and canyons that cut these lands in various directions. The deepest cut that I found might be erosions on the plateau, on the top of the plateau involved in these lands in question is about 800 feet from the plateau and on the other side—that is one of the [fol. 147] canyons that is on Coal Creek, there is a plateau on either side, and the erosion exposes the edges of the rock on the dip for a vertical distance of abou' 800 feet there. I examined that canyon very closely, and I found no signs of geological faulting. It is not to any extent possible that there could be any faulting through there and I not discover it in that canyon. I say, I mean that a faulting of a foot might not be revealed, not enough to displace the coal to any extent, I mean.

I have already stated I have examined some openings on the coal measures in that vicinity. As to how extensively the floor of this coal measure was disclosed at any place I examined, the extent of the exposure under the cover which I was not able to examine except by reason of excavations that have been made—I mean revealing either the roof or the floor in the locality around this land in question in the immediate vicinity of the lands in question, within the range of those lands represented on plat No. 1—the extent into the openings where the coal had been exposed—well, in the immediate vicinity I cannot say more than 100 feet or so. That is when you go directly in from the crop where the coal is exposed—the width as far as the coal was opened. That is merely an entry going down on the coal. I should say that opening was on an average about 15 feet. 15 feet and about 100 feet down on the dip of the coal in the immediate vicinity of these lands, something like that. That is on the opportunity I had to examine the characteristics of the floor on this coal measure other than those I have already testified to, other than those along where the outcrop comes to the surface and that of course is in various directions throughout the canyons. I found that the coal varied in thickness in different localities very materially, and would range in the neighborhood of 4 feet up to 20, it would depend upon the locality. Some of the coal was less than 4 feet. I am not sure that that lower one was less than 4 feet. *I am not sure that that lower one was less than 4 feet.* Let me see if this is one of the localities that I remember. I am not referring to the coal as exposed

in the openings or in the tunnels. Yes, there is one place that I testified to that was 3 feet and 9 inches and in the same bed at other places the thickness it assumed is about 20 feet. In the Northwest quarter of Section 14, Township 13, South of Range 10 East it was 3′ 9″ thick and the same coal bed over a mile north, a little over a quarter of a mile [fol. 148] from the lands in question thickened up to 4 ft. 6 in. There is no way by which I could determine what the water level is through that country. If there is a water level that would be a variable element. I never examined that field closely enough so as to be able to determine whether or not there is a water level there. It does not show itself by springs issuing from the canyons, that is, it has to be estimated, and there is no way by which I can tell by what I saw whether there is a water level, or, if such exists, what the elevation is between the high and low elevation of water. That is right. So that I am not prepared to say whether there is or there is (now) a water level through that country. I don't know that the existence of water in contact with the coal in any way would affect the quality of the coal. I don't know that the water affects the coal in quality. It may. As to the presence of water in any way entering into the economical working of coal deposits, it does in some instances. It is within the range of possibility that it would in this district. As to whether the larger the volume of water present in the coal beds and the coal measure the more expense to the operation of mining and the extraction of coal becomes, that would depend upon circumstances. It would depend on which way you were mining the coal. Assuming that you had to mine the coal by sinking shafts and dispose of the water by pumping the water, the element of the water would have something to do with the working of the mine. How much of a factor the element of water under these conditions would be in the economical mining of coal of course depends on the quantity of water. Each mine would depend on itself for that. It would depend upon the volume of water, depend upon the lifting facilities for disposing of the water. Except as to the disposal of the water I do not see how that would seriously enter into it if it came to the surface. That would be so in all cases except where you had your mine located in a sink or sump. When I answered in reference to a water level as being used in

this testimony I meant a water level is a level beneath the surface in which water stands in any particular bed or rock and these water levels may be any number so far as that is concerned, or there may be none. In determining whether coal deposits if any are found existing beneath the lands in question it would not become necessary to ascertain the existence or non-existence of the water and its volume and its depth from the surface and the cost of keeping it pumped out of the mine in the event the lands were being mined through vertical shafts. In determining [fol. 149] whether the coal could be economically mined, that is not true, because in all cases if it is necessary to determine that before you begin operations or made preparations or invested you would have to go to an expense. In fact, you would have to operate your land as a mining property before you could make an estimate. It is not true. Before you could determine the fact as to whether the coal extended under that surface could be profitably extracted through a shaft it would be necessary for you to determine how much it would cost to keep any water that might exist in the formation there, and of pumping it out so as to determine the mining of coal there, it might do, yes. It would so. That is an element I did not take into consideration when I undertook to classify these lands as coal lands. You cannot take that into consideration because it is an unknown quantity at that time. A mine operator would not determine that beforehand either. I have learned from experience in examining coal fields that occasionally the floor of the veins of coal or the rocks constituting the floor is not always uniformly level, but on the contrary, now and then, there is a fluctuation and a swell in the floor, and it is not very often that you can tell just where these things exists except by actually seeing them. That same thing is occasionally true as to the overlying on the roof rocks that come in contact with the coal veins, especially (is) the coal vein is overlain immediately by sandstone. Very uncommon where there are shales. I do not recollect a single case in which the shales overlie. Very often in examining a coal field that has been developed to a considerable proportion it is discovered and disclosed that there are contractions in the width of coal beds that cannot be located with any certainty except by actually seeing the locality. So that the extremely local occurrences

of characteristics which are calculated to circumscribe the thickness of coal deposits cannot always be accurately figured upon except by seeing them after exposed to view. When I say "extremely local occurrences" that is a relative term, and might apply to areas as big as a section or more—it may be, I don't know. It is within the range of possibility. You are taking individual beds now, of course, as to whether from the fact that the width of the coal bed or a bed of coal is one of the elements that enter into the economical working of the same, where it lies far beneath the surface of the ground, therefore before you could determine the commercial advisability of undertaking to mine a given vein of coal from the surface it would be [fol. 150] necessary for you to have some knowledge as to about what its proportions were, I say not necessary. Of course, it would be profitable if we know all possible about it, but of course that is not usually done, and it is not usually expected by miners or operators, today especially, or at least they don't do it at all that I know of. Mining operators on a big scale are usually business men; those who succeed, and actuated by logical conservative business methods. It is the practice in this country, that usually men starting in to develop a coal field start at or close to the outcrop of the known beds of coal. It is usually only after development of some considerable preparation has been made or investigation they undertake to develop the territory presumed to contain coal in those veins far beneath the surface of the ground. That practice is carried on I will admit, but it is very evident on the face of it, in fields where I have worked, that the objection to proceeding that way in the beginning was because it was more economical, because they could get more coal for their money. But it is usual, nevertheless, simply for that reason. As a rule I think that a certain amount of drilling is done in the vicinity of where the shaft is put down, but I have been in fields and I have observed myself shafts that have been sunk to a depth of 1,000 feet, or something like that, even though there was no coal. If it was found necessary to sink a shaft 1,000 feet deep by the parties, experienced engineers, they put a diamond drill down simply as a prospect, and determined something of the kind of rocks they have to deal with and that work is usually let under

contract because they want to know what they have to deal with in sinking that shaft, independent of the coal. I do not know of any man, even though an experienced coal man, sinking a shaft from 1,000 to 3,000 feet for the purpose of developing a coal mine when theretofore no development had been made on the coal belt or the coal bed at or near the outcrop. I have knowledge, I say, in regard to that. I do not know of anybody having done that. No, and no particular instance to the contrary, indeed. So far as I know any case of plans for the development of coal lands before this drilling is done, before he has established a large mining camp, or before he has gone to much expense, he has either bought or holds under lease these tracts of land, bought them as coal lands or holds them under lease as coal lands. These lands, as a rule, may be one and a half to several miles from the known occurrence of coal; these lands are his as coal lands; before he does this prospecting, before he puts his drills down; he has [fol. 151] has sufficient evidence to assure him these are coal lands, or in other words, he has paid the price as coal lands, or holds them under lease as coal lands. As to my having been in the habit in my inquiries of going into private business matters of men who are developing coal property, I have observed what is done in the fields in which I have worked. As to having heard from the men who owned and what they were doing, as hearsay, well, all matters of that kind, of course, are information from the persons themselves. I say all matters of that kind are information from the persons themselves or official information which I have gained, in some cases, in my own experience. I mean by official information on a subject of that kind, well, lands that have been leased by the government, and I have been informed officially that those lands are held for the purpose of mining. We have just been speaking of isolated cases, those that I knew and investigated personally. The others, of course, I know nothing about. I do not know what the general rule or custom is on that subject I was asked about excepting in the regions where I worked; not in every part of the region. I know of no instance where a coal man owned ground including the outcrop of the coal and another man owned the ground a mile or a half-mile removed from the outcrop of the coal where the latter man undertook to sink a shaft or enter into the coal mining busi-

ness without knowing what the characteristics of that deposit were by actual deveolpment having taken place at or near the outcrop, because a matter of that kind never came to my attention; because the man as I say as a rule controlled the coal from the outcrop. As to those instances then I have been testifying about what was done in development of coal lands having referred to cases where one man owned the crop as well also as the lands back from the crop, and if it was presumed or assumed that the coal measures existed. I say not necessarily. I do not recall any case of actual ownership. I know of cases—ownership or qualified ownership as a lease on some option giving them the right to purchase—Yes, sir, I have known of such instances in numerous cases. Numerous lands back from the outcrop that were taken and held by individuals. What I mean by the Director of the Geological Survey, there was, as I stated, a chief of the division dealing with the classification of coal lands, and all matters were naturally referred to him in regard to the classification of the lands. This chief was a N. W. Campbell. I know now there is a commission, but I did not know then—the duty of that commission is to examine that report and decide if the evidence is ade-[fol. 152] quate for the classification of the coal land. The committee now consists of three or five. I don't know which. There was not a committee of that number at the time I was making (my) investigation. The first committee was appointed, so far as I know, either in 1908, or in the early part of 1909. That was the first time it was appointed specifically for this purpose. Prior to this the chief of this division, Mr. Campbell, passed on the sufficiency of the proof submitted by an examining geologist to constitute a classification. Occasionally, the whole force of the geological survey, engaged in the classification of coal land, were called together to discuss and consider various features in respect to the classification of coal land. Now information would come, of course from every man's report.

The examination of this proof was for the purpose of determining whether all of those factors constituted sufficient proof. The principal element was the depth, the limit of depth, at which it was considered, under the present method of mining, coal could be operated. The manner of

cost was not discussed, that I remember of in the report, so far as I observed it, and I read it only in part.

I did not read the complete report. It has not been shown by experience, or otherwise, that I know of, that where a large body of land is in the control of an operator—the coal upon a whole cannot be mined as profitably by shafts to a considerable depth, say two or three thousand feet, as from the outcrops, because one of the elements entering into the consideration of mining a large tract of land that a man might have under his control is, that he has coal on all sides, and he can operate on the coal in various directions from different points of contact. Besides, if the coal is inclined, as it is in this field and most fields, to a certain extent, he arrives at a position on the coal by shafts where he can control a large output of coal above it, so that he does not have to haul his coal first out of a long entry, or along slope upgrade, but he has a haul on lower grades, and gets his coal from large areas at low cost by gravity mainly down to the shaft, where he has simply to hoist it; whereas if he works in the outcrop he would simply have the coal on one side, and the more you mine the further you have to haul it, and have to haul it up grade. I do not know the ratio of cost between mining by shaft and incline.

Whether coal can be extracted from the mine a mile away from the outcrop as cheaply as it can be mined at or near the outcrop, would depend on the amount of cover and the position of the coal, the altitude of the coal, and as to [fol. 153] whether horizontal or otherwise. Those elements all enter into the question of whether the coal can be mined at a commercial profit.

I did not take any of these elements into consideration at any one given place in these lands in question. The lands in question were removed equally far from the outcrop and stand practically in the same position in regard to the proposition.

I do not know of any instance where men, practical coal operators, or coal mining operators, have ignored the outcrop of coal deposits, and without any knowledge of the characteristics that are disclosed near the apex, have gone, at points far removed from the apex, and sunk shafts for the purpose of mining coal presumed to extend beneath the surface as such, to a distance of say, one thousand feet.

I did a part of the clerical work in preparing the map, Exhibit 1 as I remember it, in locating certain crops of the coal on it. I do not remember now just exactly—I could not point them out specifically. I assisted in that to a certain extent.

Exhibit 2 was constructed practically entirely by an engineer under my charge, or a draftsman, who was an engineer and draftsman on that survey. I quite carefully compared them afterwards. The official act was not mine.

Coal lands are not classified in the true sense of the word until they are approved by the Commissioner of the Land Office. That is the final act of classification. I did not know at the time before I got through with this classification that this classification, if accepted, was really a reclassification of one that had been made prior to that.

I do not know what it cost between the year 1900 and the year 1905 to sink a shaft from five to six feet in the clear, to a depth of one thousand feet in this locality, and I do not think anybody else did so far as I know. I could not possibly determine what it would cost to install the necessary machinery ordinarily used by mining operators to hoist coal from a shaft one thousand feet deep there in sufficient quantities to justify the operation of a mine as a commercial proposition.

In my opinion there are certainly subdivisions of land included in the lands in question of 320 acres that could not be operated profitably, possibly. I would designate those that lie along on the highland in the plateau, taking those individually, as the North half of Section 1, and the North half of Section 2, and the North half of Section 3, Township [fol. 154] 13 South, Range 10 East. The same would probably apply to the West half of Section 33, and possibly to the East half of the same Section, the North half of Sections 26 and 27, in Township 12 South of Range 11 East. These individual tracts are the least accessible, and have the deepest cover over the coal.

I believe it would be profitable to extract the coal from the main operations of the land.

With such information as I have at my command at this time, I cannot tell within what degree of certainty one could arrive at the cost of extracting the coal that may exist under the surface of each one of the other 320 tracts, if any such exists, in the event a shaft 500 or more feet deep was re-

quired, through which to extract the coal, because there are so many elements that are not determined in regard to the (disposition) of the coal, and those things that it would be entirely a future proposition.

It would not be determined until the operator was assured that he could get his coal marketed and many other things are now in hand that would have to do with the development of the coal in the particular lands thus separated into 320 acres.

These factors I have mentioned also become more important if you reduce the area intended to be minded to 160 acres. A tract could be so small it would be improper to consider it. When I look this tract over that is portrayed in these exhibits, I look it over as an entirety.

I realize that to mine it, it would not be impracticable for the owner of any one of those forty acre tracts to undertake to develop it as a coal mine, expecting to realize a profit from the operation of it. I did not assume that any particular 40 acres of that tract was known to be operated as a coal land, or any particular 160, or 120, or more. I made no computation in that way; and in determining what the character of the land was I did not take into consideration how much of that land an operator would have to have to make it a commercially profitable (enterprise).

I realized that in an examination of the field, without any reasonable doubt in my mind, that there was not a (tonnage) in each individual acre under that area that would warrant profitable mining. I, of course, considered there that a man could control enough land to put up and establish a mining plant; would get a mine, and if he had not enough to mine, he would not; he would be his own judge of that. But I did [fol. 155] not take into consideration the amount of area that would be necessary at any given place to justify a man in making the expenditure.

Redirect examination.

By Mr. Maynard:

The drilling would be done for the purpose of obtaining all possible information, realizing, of course, there might be a certain range in the volume of coal that would be contained under any particular tract, and having that information beforehand it would be of service.

There will be no doubt in my knowledge of the land as to the existence of the coal beds; the drilling there would not be for that purpose but being absolutely assured I would make the excavation and drill the holes for the purpose of mining it most profitable way of extracting the coal. There are about 30 miles in a circuitous direction formed by the indentations and ravines of the mountains between the mines at Castle Gate and the mines at Sunnyside and at the two termini at Castle Gate and Sunnyside there are now, and have been for many years, very large coal mines, which have been and are now being worked. I saw the coal beds in the Sunnyside mine. I found two beds of coal there.

The thickness of the lower range in this particular part of the mine on the dip as I remember was from about 4 to something over 7 feet. The upper bed in this particular part of the mine ranged from 4 to 6 feet as I remember. Another entry oblique to the dip between the dip and the strike extended for more than a mile and contained a thickness of as high as 10 feet; this was in the mine at Sunnyside. I cannot say that the beds at Sunnyside are the same beds as those in the land in question. I made an examination of the mines at Castle Gate—I found that in the mines at Castle Gate the entries were driven on a rise instead of on a dip. They were mining on the southwest side of the canyon, and the entries were driven towards the southeast, whereas the rocks dipped from the outcrop on the opposite side of the canyon to the north. The coal was under cover where it would not be seen from the work of excavation by the naked eye. I was not able to determine the exact distance, but as near as I could determine entered the mines at a distance of about three quarters of a mile. This bed is in the same position as the lower bed on that Exhibit 2, and traced in this locality westward to the cliffs in the vicinity of the lands [fol. 156] in question. They are the same coal regions, between the large mining plants at Sunnyside and Castle Gate and within this 30 mile limit bewteen the two points and are in addition as far as I know—at the time the investigation was made in June, 1909, there were three mines opened, through which coal was taken from time to time and a fourth being opened, entries being run and railroads being constructed to the openings—whether or not that mine is now in operation I don't know. The railroad is a spur from the Rio Grande Western Railroad in the canyon of the Price

River up Spencer Canyon to the Northeast quarter of Section 7, built, as I understand, solely for the purpose of transporting the coal from these mines and from the adjacent territory to the main line on the railroad. There is a railroad, a branch or spur from Spring Glenn on the Rio Grande Western Railroad up to what is known as the Kenilworth Mine in Section 16. As to the names of those four mines, well, the first one I referred to in Panther Canyon was called "The Kemmerer", owned by the man operating it. The mine in Section 16 at Kenilworth I believe is known as the Independent Coal & Coke Company. The third is in the western part of Cordingly Canyon in the Southwest quarter of Section 10, all of these in Township 13, South of Range 10 East. This is known as the Aberdeen Mine, and the other is located in the east fork of Cordingly Canyon in the Southwest quarter of Section 11, and is known as the Milburn mine. The terminus of the railroad spur up Panther Canyon to the mine is a little over two miles to the west; the terminus of the spur up to the mines in Section 16 is about a little over one mile southwest of the lands in question. In addition to these four mines there appears on the Exhibit as I found prospects and natural exposures. I stated there were 70 yesterday, so that between the Castle Gate mines and the Sunnyside mines there are four mines of coal, 70 prospects and natural exposures that appear on the map, that I personally examined and have testified about. I stated in my direct, and I think also on cross examination, that the formation that includes the coal beds is the same throughout this district. As I stated before, these coal beds as a group extend from the surface of the lands in question. The coal can be mined from any and all of the lands in question, either from the crop at various localities, some of the localities being in the lands in question, or from shafts located on these lands. The coal contained in the beds that I have specifically described could be mined and brought to the surface from the groups or entries appearing, or they could be made upon [fol. 157] the lands marked on Exhibit 2, as entered by coal cash entries from these lands that are colored in blue as indicating coal cash purchase lands and none of them at the furthermost known point are more than three miles. The extreme distance I believe would be about three and one-quarter miles. Most of the lands that are in dispute

are within two miles. I mean the extreme north limit of most of these lands would be within two miles from the outcrop. I don't know of any geological obstacles that would seriously interfere with the operations in removing the coal more than is ordinarily encountered in coal mining.

Q. So that all the coal could be extracted by the man who controlled the outcrop, or by other persons who owned the land to the north, who could make a business contract with the operators of the lands that they enter.

Mr. Edwards: I object to that question as calling (to) the conclusion of the witness as to whether one man could make a contract with another.

Q. Assuming that such a contract was made.

A. Assuming that that contract was made with anyone or with any of the individuals controlling the outcrop, all of these lands are accessible from such locations in mining operations.

Coal beds are generally of wide extent and of regular formation, the result of slow accumulations at the earth's surface, following laws of occurrence common to stratified formation and consequently conforming to the law of adjacent strata, which differ radically from the metalliferous ores, which rarely occur in sedimentary beds. Instead of occurring as a rule in sedimentary beds as coal the (metalliferous) ores are most generally found in veins and pockets and replacements, impregnations and contact deposits and from the nature of their origin, present such abrupt variations in form and character as contrary to the sedimentary deposits and of coal as to preclude the safe prediction of their quantity and quality in advance of exploitation. In many districts, and particularly in the one contained in the lands under consideration the geologists can easily ascertain the extent of variability from the condition of the deposits, the degree of persistency of the coal beds, and readily determine in most fields the geologic structure, and can, from that data, determine the area of workable coal and closely approximate the depth at which an outcrop of coal will be found in the field. The territory that is embraced within the lands named in this bill is of exceptional regularity as to the beds as geologic occur- [fol. 158] rences considering them as a group, because as

I have stated in my direct, and I think in my cross-examination, that the formation which contains the coal is continuously exposed to the field, and that the horizon of the coal bed, particualrly the one at the base in this district, is easily traced and that in all of the observations in this district, whenever an attempt has been made to locate the coal by prospect, even though the coal itself was not revealed there has been no failure to do so. In this district and especially in the region of these lands I don't recall a single instance where an attempt has been made without the coal being revealed or the presence of the coal determined, so clearly was the occurrence of the coal determined from the surface indications from the relations of the coal beds to certain sandstone formations that occur parallel with the coal bed. In some instances the prospect had been driven upon the burned edges of the coal and the particularly burned coal, or the ash produced from the burned coal was revealed. Those instances were comparatively rare; as a rule the attempt was made where the evidences of the coal were not particularly pronounced. Many of these sedimentary beds were visible to the naked eye sufficient to keep clearly in mind the position of the entry bed that might be found in close relation to it, and the stratum of coal was imbedded between similar sides of other kinds of rock, chiefly sandstone and shales. I should say as a rule that it is true from a geological standpoint that while a coal may belie itself at one point or two where openings are made it does not at a dozen. I should say as a rule that would hold. While veins of copper, lead and iron alternately decrease and diminish in size, rapidly and unexpectedly, and while it is true that the miner never knows until he continues on the vein what it will be worth or how soon the pocket which he has entered may close up between bare walls, that geologically is not so with coal. With coal all blanket formations which extend through the mountains very seldom disappoint and what it is at one point it is very likely to be the same at the other. That is the general rule, and especially so as found in this region as far as the indications of the bed could be determined. I am able to state from my geological knowledge that what is known as the great Pittsburgh bed is a remarkable instance of this law of continuity; that it covers 10,000 square miles, and scarcely varies from a degree of 8 feet showing itself a double bed, and

everywhere producing both a superior quality and quantity of coal. That is true as far as I have observed that particular coal bed in the western part of Maryland and West [fol. 159] Virginia, where I investigated that field, and so far as I have learned from published reports of other geologists who have worked in other parts in that region. I believe I have stated, but I can repeat, that from the evidence revealed it would be considered a geological impossibility for the coal beds of the well defined thickness and strength that I saw in the fields that are now under examination and where I saw them at the outcrop and saw them extending in the direction, that they should on their dip suddenly and in comparatively a few feet pinch out entirely and disappear. I would say from my knowledge of the coal formation as to whether or not a practical mining man who was giving his life and his attainments and his money to the development of coal fields, whether or not he would have any doubt whatever as to the existence of coal in the lands north of the lands where the coal actually crops, I believe that from the facts revealed as to the occurrence of coal in this district, that a practical man would not hesitate to invest in the land in question as coal lands, from the fact that in other districts known to me lands are held and controlled by practical coal operators where the evidence as to the occurrence of coal along the crop and there was no other evidence at hand, was not one-quarter as decisive and conclusive in its abundance as this district; where in fact but two, and in many cases but one coal bed was known and known only at the outcrop in the vicinity of the lands that were controlled by those coal operators.

Q. Now, my brother Edwards called my attention to certain matters that you communicated to Washington prior to your entering upon the work of classifying these lands, and particularly to the communication which you addressed; and he presented you the matter which appears in the published report for the purpose of allowing you to refresh your recollection as to what you communicated to Washington. Now, I, for the purpose of having it appear, and that the court may have before it the entire subject matter, I offer to read in evidence as a part of complainant's proof all that appears in Volume 34 of the decisions of the Department of the Interior, relating to public lands,

on pages 194, 195, 196, 197, 198, 199, 200, 201, 202, and part of 203 to the end.

By Mr. Edwards: We object to it as incompetent and immaterial.

[fol. 160] By Mr. Maynard: This is published by the Government Printing Office in Washington, and is the official volume of the decisions of the General Land Office, of the Department of the Interior, and the General Land Office in cases relating to public lands from July 1, 1905, to June 30, 1906, and I will read it into the record as follows:

(Here counsel reads what he has cited about.)

By Mr. Maynard: I, also, in this connection, for the purpose of showing the uniformity of the decisions of the Department of the Interior on the very subject about which we are now considering, offer and read in evidence what appears on page 215 and part of page 216 of the decisions of the Department of the Interior, relating to public lands in Volume 36, July, then '07, July, '08.

By Mr. Edwards: We object to it as incompetent, irrelevant and immaterial to this case.

By Mr. Maynard: What is said by Commissioner Ballinger as to rule as to classifying coal lands, as follows:

(Here counsel reads the quotation cited.)

By Mr. Edwards: My objection that it is incompetent, irrelevant and immaterial to this case goes to the statement of counsel in which he refers to what Commissioner Ballinger says, and I move to strike it out for the same reason.

Q. You may state whether or not in your investigations of the lands in this field and which are the subject of this lawsuit, you considered the character of the outcrop, the extent of their exploitation, the nature, extent and result of the exposures of coal beds otherwise made, the positions of the outcrop or openings with relation to each other and to the tract in controversy, the thickness, merchantable quality and identifying characteristics of the coal bed, the geological formation and other data whereby the position, area and extent of the coal beds with respect to the tract in controversy were determined.

[fol. 161] By Mr. Edwards: I object to that as a leading question and as a repetition because the witness has already testified as to all the things taken into consideration by him in determining what classification to be placed upon the land.

A. I have.

By Mr. Edwards: I ask to have his answer stricken out for the same reason.

This decision of the Secretary was in existence prior to the classification of the lands in question, if I understand correctly the decision, which is the decision or ruling that was made in connection with and following my letter of recommendation to the Geological Survey.

The Geological Survey had not entered upon any special investigations of the coal lands for the purpose of classifying these lands prior to 1905, and in 1905 I was directed by the Chief Geologist, C. W. Hays, to enter upon this work in Utah.

Friday, January, 14, 1910.

Redirect examination of Mr. Taff resumed.

By Mr. Maynard:

According to my (estimated) based upon acreage furnished me as to the areas of the various parcels of land and the total area of lands in dispute taking as the basis what is considered minimum average thickness of coal as stated in the examination yesterday, I estimate that the lands would contain 22,258,560 tons of coal. This is simply an estimate based upon the figures given me.

Q. Now on that subject, I call your attention to the lands marked on Exhibit 2 which represent the coal cash entries of Mr. Milner and his family and friends. What would you say as to whether or not those lands, notwithstanding they are coal lands and the crop actually appears on the surface, would be sufficient in themselves to justify Mr. Milner in buying those lands for mining purposes and erecting a plant and installing machinery for the purpose of mining single entry?

Mr. Edwards: I object to that as incompetent, irrelevant, [fol. 162] and immaterial, not within the issues made by the pleadings and improper redirect.

A. I see on this map Exhibit 2, the various tracts indicated as coal cash purchase range in area from 80 to 320 acres. The largest of these, this one containing 320 acres approximately, I see as indicated on the map, contain about 260 to 280 acres of coal, part of this land lying below recognized coal areas. From what I know of coal mining operations in the various fields I have investigated, except for local consumption or mining on a small scale in the immediate vicinity of the lines of transportation, that areas of this size if the operator could control none other, could not be mined profitably on a large scale. In other words, he could not afford to establish a mining plant commensurate with the commercial production of coal on a profitable scale. In other words, if he intended to mine coal for a period of years to any considerable extent he would require more acreage in order to develop his mining plant and to make it to any considerable extent profitable.

As to whether Mr. Milner, assuming that he was a man of large experience in the geology of this country and particularly with the lands described on Exhibits 1 and 2, would make the entries known there as the coal cash entries and seek to purchase the lands immediately adjacent thereto without absolute certainty that if he progressed with his work and drove his tunnel in the lands marked blue that he would drive them without interruption immediately into the lands adjacent and marked orange, and know that the coal beds which he had developed in the lands marked blue would be of the same character and same thickness and same quality as the adjacent lands, I say essentially as stated and I believe the same question was asked before.

Some of the lands in question are quite rugged, in certain places almost inaccessible. Other parts are not so rugged, especially in the ridges between the principal falls and gulches. These lands contain some grass, more herbage in the way of shrubbery (than) in the lands below, that they contain practically no water except in the spring after the snow melts or immediately after rains. These lands are accessible to pasturage by sheep, to a certain extent, to a less extent I should say by cattle. These lands I would say would

have some value for grazing purposes whereas those below would have practically no value. Certain parts of the lands [fol. 163] in question indicated on the same plat in a greenish shade which contain smaller areas of land in question than the other, are on a plateau above the cliffs, and are comparatively smooth, containing as a rule, a thick growth of sagebrush, some grass, especially along the valleys, quite an abundance of grass. The same area contains certain limited areas of aspen forests. Of these three classes of lands in the lands under question, this would have most value for grazing purposes. Not being conversant with the values placed upon lands in this State of various kinds for grazing purposes, I am unable to state what values would be placed upon these various classes of land if taken separately.

I noted on the ground that sheep were being pastured on the West half of Section 33, Township 12 South Range 11 east; how long they had been on the ground I do not know, but I noted that what grass was present seemed to be practically destroyed where these sheep had been grazing over the land, especially in the vicinity of the camps where the sheep were brought in in the evening and taken out in the morning. I don't happen to have any personal knowledge as to when the vegetation upon which even sheep could graze in a country situated such as this is is once destroyed how long it would take before there could be a new growth sufficient to give any food supply to any considerable number of sheep, because I have not spent sufficient time in the field to make such observations. For the purpose of raising crops I make the distinction between the portion of these lands that might be adapted for grazing purposes and that which is named as agricultural lands, and I would confine the possible use of these lands to grazing differentiated from agriculture from a man who would make a settlement there and make a home. In the sense of cultivating the land it would be impossible in my opinion, both from the character of the soil and the situation to pick out 160 acres in that entire tract that could be utilized for that purpose.

Recross-examination.

By Mr. Edwards:

As a matter of fact, the answers given by me in my redirect examination are conclusions drawn from the same facts

which I testified to on cross examination. I have not considered any further facts than those testified to on cross examination. I do not wish to be understood as saying that I have examined all the workings of the Castle Gate mines not in the sense of going to every room and side entry of the mines. I passed the main entry on the West, as I re-
[fol. 164] member, and then worked my way through the mine near the working face to the entry on the opposite side and came out then on the opposite side of the mine. I do not wish to be understood as saying that I examined all the workings of the Sunnyside mine. It was in existence in 1905. I did not see any indication in the Sunnyside mine of large local areas where there was not marketable or merchantable coal, and when I testified that the coal beds, as a matter of fact extended beneath the grounds in area, that was a conclusion drawn from the facts which I testified to on cross examination. When I said that coal could be extracted from these grounds in question upon shafting at a profit in a commercial way, I drew that conclusion from no other facts than those which I testified to on cross examination, and the inferences and conclusions which I arrived at in reference to the existence of coal beds, their thickness, etc., was a scientific conclusion of mine from the facts I saw in the field.

Whereupon, the plaintiff offered in evidence the original bill of complaint in the case of the United States of America vs. Truth A. Milner, the second amended bill of complaint in that case, and the answer of the Carbon County Land Company.

Mr. Wilson: Now comes the Independent Coal and Coke Company and objects to the introduction of each of the offers made by the Government on the ground that they and each of them are immaterial to any issues involved in the instant case on trial and they are irrelevant to any such issue and that they are in no sense evidence tending to prove the contentions of the Government in this case with reference to the Indepedent Coal and Coke Company, it appearing conclusively that the statute of limitation had run in favor of the State of Utah prior to the time when the Independent Coal and Coke Company acquired any title from the State of Utah to this land.

Mr. King: I adopt the objection as far as made on behalf of the Carbon County Land Company and in addition there-

to I object to it as incompetent, irrelevant and immaterial for the reason that the title obtained by the Carbon County Land Company from the State of Utah in 1920 was in no sense involved in or refers to any matters or things presented by either or any of the exhibits referred to.

Mr. Parker: The State of Utah objects to the offers made and each of them as being incompetent, irrelevant and immaterial, particularly as to the State inasmuch as it is not [fol. 165] a party to the original action and anything done in the original case is not binding upon the State particularly because the statute of limitations has run in favor of the state, the lands having been certified to the state regularly and title having vested in the state long prior to the beginning of any action in which the state was a party.

Which objections the court overruled and allowed exceptions to each of the defendants. The Bill of Complaint was then read in evidence as follows:

OFFER IN EVIDENCE

"IN THE CIRCUIT COURT OF THE UNITED STATES, EIGHTH CIRCUIT, IN AND FOR THE DISTRICT OF UTAH (901)

In Equity. No. 281

UNITED STATES OF AMERICA, Complainant,

vs.

TRUTH A. MILNER, Executrix of the Estate of Stanley B. Milner, Deceased; Truth A. Milner, Harley O. Milner, Samuel H. Gilson, Carbon County Land Company, a Corporation, and Peter N. Campbell, Defendants.

Bill of Complaint

To the Judges of the Circuit Court of the United States for the Eighth Circuit in and for the District of Utah:

The United States of America, complainant herein, brings this bill of complaint against Truth A. Milner, executrix of the estate of Stanley B. Milner, deceased, who was, at the time of his death, a citizen of the State of Utah, residing in Salt Lake City, Salt Lake County, in said State of Utah, wherein his estate is now being administered; Truth A. Milner, a citizen of the State of Utah, residing at Salt Lake

City, in the State of Utah; Samuel H. Gilson, a citizen of the State of Utah, residing in Salt Lake City, in the State of Utah; Carbon County Land Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its office and principal place of business in Salt Lake City, in the State of Utah; Harley O. Milner, a citizen of the State of Idaho, residing at Milner, in the said State of Idaho, and Peter N. Campbell, a citizen of the State of Massachusetts, defendants; and complainant alleges:

1st. That this suit in equity is brought by the authority of and under the direction of Charles J. Bonaparte, Attorney General of the United States of America.

2nd. That the Carbon County Land Company is a corporation, duly organized and existing under and by virtue of [fol. 166] the laws of the State of Utah, with its principal place of business and office in Salt Lake City, in the State of Utah.

3rd. That on the first day of January, A. D. 1900, complainant was the owner in fee, and entitled to the possession of the following described tracts of land, all situate in Carbon County, in the State of Utah, which said lands, on the day and year aforesaid were vacant, unreserved and unappropriated, and were rough and broken in character, and unfit for agricultural purposes, and of slight, if any, utility for grazing purposes, but all of said lands, at said time, were well known coal lands, and chiefly valuable for their coal deposits, and were at said time of the value of more than one hundred thousand dollars on account of their valuable coal deposits; that said lands are described as follows, to-wit:

The Northwest quarter (¼) and the southeast one-quarter (¼) of Section twenty-two (22); the east one-half of Section thirty-three (33); all of section thirty-four (34); the south one-half (½) of Section thirty-five (35), township twelve (12) south, range eleven (11) east, Salt Lake Meridian, 1920 acres.

The north one-half (½) of Section twenty-six (26), township twelve (12) South, range eleven (11) east Salt Lake Meridian, containing 320 acres.

The north one-half (½) of section thirty-three (33), township twelve (12) south, range eleven (11) east; Lots

1, 2, 3, and 8, Section three (3), township thirteen (13) south, range eleven (11) east, Salt Lake Meridian, containing 477.04 acres.

All of sections one (1) and three (3), the north one-half (½) of section ten (10). the north one-half (½) of section eleven (11); the north one-half (½) of section twelve (12); township thirteen (13) south, range ten (10) east, Salt Lake Meridian, containing 2244.24 acres.

The southeast one-quarter (¼) of section twelve (12); the east one-half (½) of the northeast one-quarter (¼) of Section fourteen (14), township thirteen (13) South, Range ten (10) east; the northeast one-quarter (¼); the north one-half (½); the northwest one-quarter (¼); the east one-half (½); the southeast quarter (¼); the northwest quarter (¼) of the southeast quarter (¼) of section seven (7), in township thirteen (13) south, range eleven (11) east, Salt Lake Meridian, containing 603 acres, making a total amount of 5564.28 acres.

[fol. 167] 3rd. Your orator further shows that Utah was admitted into the Union by "an Act of Congress, entitled 'An Act to enable the people of Utah to form a constitution and state government, and to be admitted into the Union on an equal footing with the original states, approved July 16th, 1894. By said Act the State of Utah was granted, by complainant, upwards of one million acres of land, for the establishment and maintenance of state schools, asylums, institutions and other state purposes, which lands were to be selected by the state, under the direction of the Secretary of the Interior, from the unappropriated public lands of the complainant, and were to be disposed of exclusively for the purposes named in said Act, in manner as the Legislature of the state should provide.

That no mineral lands were granted to said State of Utah by said Act of Congress, excepting saline lands.

In the year 1896 the Legislature of said State created a Board of Land Commissioners, which was given direction, management and control of the lands granted to the state by complainant, and said Land Board was empowered to sell the same; in accordance with the provisions of said Act and the Constitution of the State, said Board was authorized to cause all of the public lands then and thereafter owned by

the state, to be selected and registered, and after the Board should have so selected and numbered the same it became its duty to take such action as necessary to secure the approval of complainant and a final transfer of said selected lands from complainant to said State.

Your orator further shows that the only lands which the State of Utah was authorized to select and obtain title to from complainant, were surveyed, unappropriated, unreserved, non-mineral lands (excepting saline lands, which were expressly granted to the said State of Utah) and no officer of complainant had authority to transfer the title of complainant to said State to any public lands that had been appropriated or reserved, or were known mineral lands or coal lands, or classified as mineral lands.

4th. Your orator further shows that the only way by which said lands could be legally procured from complainant was through compliance with an Act of Congress, entitled, "An Act to provide for the sale of lands of the United States containing coal," which Act was approved March 3rd, 1873, and is in part as follows:

[fol. 168] "1. Section 2347. Every person above the age of 21 years, who is a citizen of the United States, or who has declared his intention to become such, or an association of persons, severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivision, any quantity of vacant coal land of the United State, not otherwise appropriated, or reserved by competent authority, not exceeding 160 acres to such individual person, or 320 acres to such association, upon payment to the receiver of not less than 10 dollars per acre for such lands, where the same shall be situated more than 15 miles from any completed railroad, and not less than $20.00 per acre for such land as shall be within fifteen miles of such road.

"2. Sec. 2348. Any person or association of persons, severally qualified as above provided, who have opened and improved, or shall hereafter open and improve any coal mine or mines upon public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry under the preceding section of the mines so opened and improved, provided, that when any association of not less than four persons, severally qualified as above provided, shall

have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding 640 acres, including such mining improvements.

"3. Sec. 2349. All claims under the preceding section may be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by filing a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the 3rd day of March, 1873, sixty days from the expiration of three months shall be allowed for the filing of the declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the 3rd day of March, 1873.

"4. Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons, and no association of persons, any member of which shall have taken the benefit of said sections, either as individuals or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the [fol. 169] benefit of such sections, shall enter or hold any of the lands under their provision; and all persons claiming under section 2348 shall be required to prove their respective rights, and pay for the land filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

5th. Your orator further shows that during the lifetime of Stanley B. Milner, and on and prior to December 10th, 1900, the said Stanley B. Milner formed a plan and scheme to obtain the title to the aforesaid coal lands without compliance with the Act of Congress aforesaid relating to coal lands, and without paying the price fixed by complainant for lands chiefly valuable for coal, and with the fraudulent purpose and intent to obtain said coal lands as cheaply as possible, and with the fraudulent purpose and intent of ob-

taining a larger acreage of coal lands than he could otherwise obtain under said coal laws, which scheme was formed and entered into with the fraudulent intent and purpose to defraud the United States of America out of the title and possession of the aforesaid coal lands; that said plan and scheme so formed by the said Stanley B. Milner was to be carried out in the following manner, to-wit: To induce the officers of the said State of Utah, to-wit: the officers of said State Board of Land Commissioners, to select said lands as grazing and agricultural lands, and to induce and obtain the said officers of said State Board of Land Commissioners of the said State of Utah to represent to complainant that the aforesaid lands were grazing lands and chiefly valuable for grazing and agricultural purposes, and not valuable as mineral lands, and thus and in this manner to select said lands under the aforesaid grant of lands to the State of Utah, as provided in said Enabling Act admitting Utah into the Union, and in this way and manner to have said lands certified to the said State of Utah as Utah, as non-mineral lands, and then to induce and obtain the said officers of the said State Board of Land Commissioners to sell the said lands to the said Stanley B. Milner, and to persons selected by him, to purchase said lands for and in his behalf at a cheap price and on long-time payments.

That in pursuance of said fraudulent scheme and plan formed by the said Stanley B. Milner to obtain the aforesaid described lands as non-mineral lands, the said Stanley B. Milner, during his lifetime, and on or about December 10th, 1900, filed an affidavit and an application with the said [fol. 170] State Board of Land Commissioners of the State of Utah, to purchase the following portion of said described lands, to-wit:

N. W. ¼, S. E. ¼, Sec. 22; E. ½, Sec. 27; S. ½, Sec. 33; All of Sec. 34; S. ½, Sec. 35; T. 12 S., R. 11 E. S. L. M. 1920 acres; and

That in making said application for the purchase of said lands, the said Stanley B. Milner was required by the said State Board of Land Commissioners of the said State of Utah to enter into an agreement for the purchase of said lands, which agreement was made and entered into between the said Stanley B. Milner and the said State of Utah, contained, among other things the following express provisions: "That if said lands shall hereafter be determined to be min-

eral in character, or if any person other than the State, shall be determined to have a superior right or claim to said land, then, in either of said events, the State of Utah shall be released from all obligations under this agreement." And it is further provided in said agreement that said lands were grazing lands, that said agreement was in the form of an affidavit and was subscribed and sworn to by said Stanley B. Milner and attached to said agreement, and that the same was the following affidavit:

"Stanley B. Milner, being duly sworn according to law, deposes and says; that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the state of Utah; that he is well acquainted with the character of said described lands, and with each and every legal sub-division thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge any placer, cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit, that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said lands is claimed for mining purposes, under the legal customs and rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application there- [fol. 171] for is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing land for agricultural purposes. That the land is not occupied and improved by an Indian";

which affidavit was subscribed and sworn to by the said Stanley B. Milner as a part of his application to purchase the aforesaid lands; that at the time of making the aforesaid agreement, application to purchase and affidavit, as aforesaid, the said Stanley B. Milner well knew that said lands were chiefly valuable for the coal deposits therein, and the said agreement, application and affidavit, as aforesaid, was false and fraudulent, and was fraudulently made

for the express purpose of obtaining title to coal lands, and not for the purpose of securing said land for agricultural purposes, or for grazing purposes.

And your orator further shows that for the same fraudulent purpose and intent as heretofore stated, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, on or about April 1st, 1901, filed a similar application and agreement and affidavit with the said State Board of Land Commissioners to purchase the following described tract of land, to-wit:

N. ½, Sec. 26, T. 12 S., R. 11 E. S. L. M. 320 acres; and that said application, agreement and affidavit was in the same form as that heretofore mentioned as having been made by the said Stanley B. Milner for himself, and was subscribed and sworn to by the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, and said affidavit was false and fraudulent, and was made with the fraudulent purpose and intent of obtaining title to said coal lands, and not for the purpose of securing said lands for agricultural purposes, and your complainant alleges that said lands were a portion of the lands first above described, and were well known coal lands and chiefly valuable for the coal deposits therein.

Your orator further shows that on or about March 29th, 1902, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, filed a like application, agreement and affidavit for the purchase of the following described lands, to-wit:

N. ½, Sec. 33; T. 12 S., R. 11 E.; Lots 1, 2, 3, and 8, Sec. 3, T. 13 S., R. 11 E. S. L. M. 477.04 acres; and

That said affidavit and agreement was false and fraudulent and was made for the fraudulent purpose and intent of obtaining title to coal lands, and not with the object of securing said lands for agricultural purposes; that said lands are chiefly valuable for the coal deposits therein, and [fol. 172] were at said time well known coal lands, and are a portion of lands first above described.

Your orator further shows that the said Stanley B. Milner, on or about March 17th, 1903, made an application agreement and affidavit in a like form as heretofore alleged, as the agent of Harley O. Milner, of Milner, Idaho, to purchase the following described lands, to-wit:

"All of Secs. 1 and 3; N. ½ Sec. 10; N. ½ Sec. 11; N. ½ Sec. 12, T. 13 S., R. 10 E. S. L. M. 2244.24 acres";

Which lands were a part of the lands first above described, and that the affidavit, application and agreement was in the same form as heretofore alleged, and said agreement and affidavit was false and fraudulent, and was made for the fraudulent purpose and intent to obtain title to coal lands, and not with the object of securing said lands for agricultural purposes; and complainant further alleges that said lands were purchased for the use and benefit of the said Stanley B. Milner, and not for the use or benefit of the said Harley O. Milner, and that the said Stanley B. Milner furnished the money to purchase said lands from said State of Utah, and with the understanding and agreement with the said Harley O. Milner, that when the title thereto should be obtained from the said State of Utah that the said land should be transferred to the said Stanley B. Milner, or to some corporation, the capital stock of which was owned by the said Stanley B. Milner.

And your orator further shows that on or about September 14th, 1903, the said Stanley B. Milner, in further pursuance of said scheme to defraud the United States, did persuade and induce one Samuel H. Gilson to file an application and obtain an agreement to purchase from the said State of Utah, the following described lands:

The southeast quarter (¼) of Section twelve (12); the east one-half (1.2) of the northeast quarter (N. E. ¼) of Section fourteen (14), township thirteen (13) South, range ten (10) East; the northeast one-quarter (N. E. ¼), the north one-half (N. ½) of the northwest one-quarter (N. W. ¼), the east one-half (E. ½) of the southeast one-quarter (S. E. ¼), the northwest one-quarter (N. W. ¼) of the southeast one-quarter (S. E. ¼) of Section seven (7), township thirteen (13) South, Range eleven (11) East, Salt Lake Meridian, 603 acres.

which lands are a portion of the lands first above described; that said application, agreement and affidavit was in the [fol. 173] form heretofore alleged, and which affidavit was subscribed and sworn to by the said Samuel H. Gilson for the fraudulent purpose of obtaining title to coal lands, and not with the object of securing said lands for agricultural purposes, and which affidavit and agreement was false and

fraudulent, and was known to be false and fraudulent by said Samuel H. Gilson, as hereinafter shown, at the time said affidavit was sworn to by said Gilson.

And your orator further shows that prior to the making of said agreements, affidavits and applications to purchase said lands from the said State of Utah, through the said State Board of Land Commissioners, the said Stanley B. Milner had employed expert geologists and engineers to make an examination of the lands above described, and he himself, with the aid and assistance of the defendant, Samuel H. Gilson, who is a man of large experience, had also thoroughly examined each sub-division of the aforesaid lands, and had discovered that said lands were underlaid with vast deposits of valuable coal, and that on many of said sub-divisions large bodies of valuable and merchantable coal outcropped thereon, and that all of the aforesaid lands were chiefly valuable for the coal deposits contained therein, and were of little or no value for any other purpose, and so knowing he determined and planned to obtain the title and possession of said coal lands, with the aid and assistance of said Truth A. Milner, Harley O. Milner, and the said Samuel H. Gilson, the defendants herein, with the purpose and intent of cheating and defrauding the United States; and in pursuance of said fraudulent intent and purpose to defraud the United States out of the title and possession of the aforesaid lands, he made the aforesaid affidavit, well knowing at said time that the same was false and fraudulent in this: that the said lands did contain large deposits of coal, and that said lands were essentially mineral lands, and that said lands were not essentially nonmineral lands, as stated in said affidavit, and that the said application to purchase the lands by the said Samuel H. Gilson aforesaid was made for the use and benefit of the said Stanley B. Milner, and not for the said Samuel H. Gilson, and the money to purchase the same was furnished by the said Stanley B. Milner, and not by the said Samuel H. Gilson; and both said Stanley B. Milner and the said Samuel H. Gilson well knew at the time that all of said lands were applied for to the said State of Utah that the same were well known coal lands chiefly valuable for the deposits of coal therein, and were not either grazing or argicultural lands.

[fol. 174] 6th. And your orator further shows that it was the duty of the said State Board of Land Commissioners, on presentation of said application and affidavit to make a thorough investigation of such lands to determine their character before making and filing lists of selections with the complainant's officers thereunto duly authorized, to-wit, the Register and Receiver of the United States Land Office at Salt Lake City, Utah, for the purpose of obtaining the complainant's title thereto in part satisfaction of the lands granted by Congress to the said State of Utah, as aforesaid.

7th. And your orator further shows that the said State Board of Land Commissioners did not in fact make any such examination, or any investigation as to the character of said lands to determine whether the same were mineral, or coal lands, or non-mineral and non-coal lands, nor as to whether said lands were or were not grazing or agricultural lands, and did not do this, either as a collective body, or by one or more of its members or officers, or its agent, or agents, or by means of any person or persons employed or procured by it as agents for such purpose, but, on the contrary, acted solely on the representations of the said Stanley B. Milner and said Samuel H. Gilson, defendants herein, as aforesaid, to procure said lands for it, which representations, in the cases hereinbefore set forth and concerned in this suit, were not only interested and biased, but false and fraudulent in these essential particulars; that the said defendants, Stanley B. Milner, Truth A. Milner, Harley O. Milner and said Samuel H. Gilson, did not seek to obtain said lands for either grazing or agricultural purposes, as they represented, as aforesaid, but did seek said lands for coal mines; and also, in that the aforesaid defendants represented that they were not mineral or coal lands, when in fact said lands were mineral coal lands, and were sought to be obtained by the aforesaid defendants for the certainty that they were coal lands.

As the result of said false and fraudulent representations of said defendants making said affidavits, said State Board of Land Commissioners were induced to *ebter ubti* said contracts in writing with said applicants, defendants herein, and that upon compliance with certain conditions, not material or necessary here to be set forth, said State Board of Land Commissioners, would select the lands applied for,

and when the State of Utah should have obtained title to the same, would sell to said applicants said land, at private sale, for the sum of $1.50 per acre, or thereabouts.

[fol. 175] And your orator further shows that said State Board of Land Commissioners appointed its President and Secretary as its agents to attend to the details of its business, and to investigate the lands involved in said applications to purchase, as well as to obtain certain certified selections from complainant of lands provided for by the grant aforementioned, and so it was, that said President and Secretary, in the supposed performance of their duties, appointed the applicants, defendants herein, as aforesaid, as agents of said Board, to examine and investigate as to the character of the lands; whereupon said defendants Stanley B. Milner and Samuel H. Gilson, as your orator is informed and believes, and therefore alleges, duly reported that they had investigated and found said lands to be non-mineral and non-coal and chiefly valuable for agricultural purposes.

Your orator further shows, that at the time when said several applications were made, it was a known rule of complainant's General Land Office, that no register or receiver of any land office in the mineral states would accept an entry of non-mineral land, unless accompanied by a non-mineral affidavit based upon the personal knowledge of the entryman, and this rule applied in full force to selections when made by the State of Utah, under the grant to it by said Act of Congress. But notwithstanding this known rule, said State Board of Land Commissioners, of the State of Utah, by its President and Secretary, as selecting agents, did not comply with the same, as appears from the several affidavits accompanying the several lists in which the aforesaid lands are included. Your orator avers that the only affidavits furnished by the said State Board of Land Commissioners to said Register and Receiver, accompanying said lists respectively, was one in each case, in effect and practically the same in all cases, because a printed form was made use of, which was in substance and effect as fol-ows, to-wit:

"STATE OF UTAH,
County of Salt Lake, ss:

We, —— ——, authorized agents of the State Board of Land Commissioners of the State of Utah, being first duly

sworn, depose and say: That the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under Section — of an Act of Congress entitled: "An Act to enable the people of Utah to form a constitution and state government, and to be admitted into the Union on a footing with the original states," approved July 16th, 1894. That all of the said [fol. 176] lands are vacant, unappropriated, and are not interdicted mineral or reserved lands and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employees of the State, as to their mineral or agricultural character; that there is not to our knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to our knowledge any placer, cement, gravel, gilsonite, elaterite, asphaltum, or other valuable mineral deposit; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for minerals during any part of the year by any person or persons; that said land is essentially non-mineral land, and that our application therefore is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land applied to each and every legal subdivision thereof. That the said selections and those pending, together with those approved, do not exceed the total amount granted to the state for the purpose named."

These so-called affidavits were in each case subscribed by the president and secretary, as agents for the said State Board of Land Commissioners, and were sworn to by said officers before a Notary Public.

Your orator further shows that the Register and Receiver of Complainant's Land Office at Salt Lake City, within whose district the lands herein concerned are situated, received from the said State Board the list containing descriptions of lands involved herein, and forwarded them, as was their duty, to the Commissioner of complain-

ant's General Land Office, with notations thereon, and endorsed by them, that certain of said lands were mineral in character, as appears from the plats, papers and books in their office, but so it was, as your orator avers and charges, that the officials and the employees of said General Land Office were unduly impressed by the fact that the State of Utah was applicant for such lands, and had no knowledge or suspicion that said President and Secretary, acting as agents of the State Board, had contracted to sell said lands in advance, and did not know that no employee or agent of the State of Utah, had investigated and examined said [fol. 177] lands, and that such examination, if any ever was made, had been entrusted to the very persons who had been procured to defraud complainant of its lands in the interest of defendants, and that whatever action said persons did take was for the purpose of defrauding and falsely representing to said State Board the character and conditions of said lands, to enable said State Board to have some foundation of fact upon which to base their direct, positive and unequivocal assertions on oath, and that the State of Utah, being so impressive in its functions, as applicant for portions of the land grant by Congress, for beneficial purposes to said State, the officers and employees of said General Land Office were led to believe in the regularity, honesty and good faith of said State, and to overlook the fact that upon the face of each and every of said printed, sworn statements it was made certain that the affiants had no personal knowledge of that which they positively asserted, and no knowledge which gave force to that asserted in negative form, and that as a showing for the certificate said statements have no legal force or efficiency whatever, and contain nothing upon which the mind of the Commissioner of the General Land Office could act, or his judgment could be founded, in attempting to determine whether in fact said lands were mineral or non-mineral, coal or non-coal, and hence your orator avers that whatever action said Commissioner did take in certifying said lands to said State was without jurisdiction and wholly void, and did not avail to pass title from complainant to the State of Utah to the lands herein concerned.

Further complaining your orator shows that the Congress of the United States passed an Act which was approved August 3, 1854, R. S. Sec. 2449, which has ever since

been, and is now in force, providing as follows: "when said lands have been, or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee simple title of the land, or require patents to be issued therefor, the lists of such lands which have been, or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such list, that are of the character contemplated by such Act of Congress, and intended to be granted thereby; and where lands embraced in such lists are not of the character embraced by such Act of Congress, and are not intended to be granted thereby, [fol. 178] the list, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby." And your orator further shows that in obedience to said law it became and was the duty of the then Commissioner for the want of proof that the lands named and described in said lists of selections were of the character contemplated by said Acts of Congress, to withhold his certificate, and return them to the local land officers of complainant, but either through inadvertence, mistake, or clear error of law, said Commissioner did approve said list, and under his hand and seal did endorse his certificate thereon.

And your orator avers and charges that neither in equity and good conscience, nor in law, where the said lists of land, although so certified, available to convey any right, title, claim or interest, from complainant to the State of Utah, to any of the lands herein concerned, because the State of Utah, while not as a government, or a collective body so intending, was by and through the favor of certain of its officers and agents to safeguard its interest as heretobefore described, made to appear as an active party to a gross fraud upon complainant in a matter in which the complainant had been bestowing a gift or grant to said state, and had been made the most potential factor in such fraud, though in small sense the beneficiary thereof, and because the Commissioner of complainant's General Land Office acquired no jurisdiction to act upon such State's application to have said lists so certified by reason of the terms of the Act of Congress above set forth.

8th. Your orator further shows that the land first applied for by Stanley B. Milner, on December 10th, 1900, as above described, was approved by the State of Utah on December 17th, 1900; was approved by the United States Land Office of the State of Utah, on December 18th, 1900, and approved by the General Land Office on June 22nd, 1901; the price agreed to be paid was $1.50 per acre, or a total consideration of $2880.00 payable in ten annual payments, the first payment of which was $480.00, and the last payment of which was made on June 9th, 1906, and that the defendant Peter N. Campbell, of Springfield, Massachusetts, has, or claims to have, a mortgage lien thereon for the sum of $25,000, on account of a mortgage given by the Carbon County Land Company on or about February 26th, 1904.

That the land applied for by Truth A. Milner, by Stanley B. Milner, her agent, in application dated April 19th, 1901, described as aforesaid, was approved by the State of Utah [fol. 179] April 22nd, 1901; approved by the local Land Office at Salt Lake City, Utah, April 29th, 1901, and approved by the General Land Office December 23rd, 1901. That the price agreed to be paid the state therefor was $1.50 per acre, or a total consideration of $480.00, the first payment thereon being $80.00, and the balance in ten annual payments.

That the second described land applied for by Truth A. Milner, by her agent, Stanley B. Milner, as aforesaid, was approved by the State of Utah April 2nd, 1902; approved by the local Land Office at Salt Lake City, Utah, April 7th, 1902, and approved by the General Land Office July 9th, 1903. The price agreed to be paid was $1.50 an acre, the amount paid was $119.25, the balance to be paid in ten annual payments.

That the land applied for by Harley O. Milner, by his agent, Stanley B. Milner, described as aforesaid, was approved by the State of Utah March 24th, 1903; approved by the local Land Office at Salt Lake City, Utah, March 30th, 1903, and approved by the General Land Office May 9th, 1904. The price agreed to be paid the State therefor was $1.50 an acre, a total consideration of $3366.36. That the first payment was $561.06, and the balance to be paid in ten annual payments, and that the first payment was made by the said Stanley B. Milner.

That the land applied for by Samuel H. Gilson as aforesaid, was approved by the State of Utah December 15th, 1903; approved by the local Land Office at Salt Lake City, September 17th, 1903, and approved by the General Land Office December 1st, 1904. The price agreed to be paid the State was $1.50 an acre, or a total consideration of $904.50. The amount paid down was $150.75, the balance to be paid in ten annual payments.

That the State Board of Land Commissioners of the State of Utah entered into a contract to sell said described lands to the said Milners and the said Gilson and incorporated the description of said lands in the said lists prepared for lands granted to the State of Utah by said Act of Congress, and thereafter the said Commissioner of the General Land Office aproved the said lists submitted by the said State of Utah containing the above descriptions, and thereafter certified said lands, with other lands, to the State of Utah.

Your orator further shows that no patents from the State of Utah to said defendants have ever been issued for any of [fol. 180] said lands, but payments, as required under the said contracts have been made for the said lands to this date.

Your orator further shows that said Stanley B. Milner died at Salt Lake City, Utah, on or about the — day of May, 1906, and that he left a last will and testament, and by said last will and testament willed all of his property, both real and personal, to the said Truth A. Milner, his wife, and by said last will and testament made her the sole executrix of his said will.

Your orator further shows that as a part of the scheme to fraudulently obtain said above described coal lands, the said Stanley B. Milner, in his life time caused to be organized, under the laws of the State of Utah, a corporation known as and called the Carbon County Land Company, which corporation was duly organized, as aforesaid, under the laws of the State of Utah, and all of the stock of which was owned by the said Stanley B. Milner, at the time of his death, excepting an insignificant number of shares given to persons solely for the purpose of enabling the said corporation to be formed, and your orator further shows, upon information and belief, that as a part of the scheme to defraud your complainant as aforesaid, all of the aforesaid agreements to purchase the aforesaid lands from the State

of Utah, have been assigned and transferred to the said Carbon County Land Company, defendant herein.

Your ortator further shows that the legal title to said lands is still in the State of Utah, that is, that such payments as have been made by the said Milners and the said Gilson, defendants herein, on the said contracts, were all made with moneys furnished by the said Stanley B. Milner, during his lifetime, or someone acting for him and in his behalf, or by his estate since his death, and that the sole purpose and intent of said defendants in making said applications to purchase said lands, and said agreements, was to acquire the title and possession of said lands in the interest of, and for the benefit of the said Stanley B. Milner, and in pursuance of said understanding and agreement as your orator is informed and believes, said assignments and transfers of said contracts have been made to the said Carbon County Land Company, defendant herein all of the stock of which is owned by said Truth A. Milner, as the sole legatee of the said last will and testament of said Stanley B. Milner, deceased, excepting a few shares to enable other persons to qualify as officers and directors of said Carbon County Land Company.

[fol. 181] 9th. Your orator further shows and further alleges that all of the aforesaid certified selections of the aforesaid lands should be declared null and void and of no effect, and all the conveyances by which any of the defendants claim right of possession or title to said lands herein described, should be set aside and held for naught, and complainant should be fully restored to the possession of said lands, and all clouds upon the title removed therefrom because the decision and certificate of the Commissioner of the General Land Office was made and obtained through inadvertence and mistake, and by the application of erroneous rules, in this: that the said Commissioner held and decided that the lands herein described were non-mineral lands, without any legal evidence before him tending to show that the same were non-mineral lands, and contrary to the rules and regulations theretofore made and issued by the Secretary of the Interior, and further, that although it appeared by the notations to the local Land Officers of complainant, that many of the descriptions of lands embraced in said lists were mineral lands, as appeared from the plats and records in their office, and the report of the surveyor of complainant,

and the accompanying field notes of his survey showed that there were well-defined veins of coal on said lands of superior quality, and that coal was in large quantities exposed to view on each of said lands, and that the same was chiefly valuable for said coal deposits, and of little or no value for any other purpose, yet said Commissioner did certify that all of said lands were non-mineral lands, and in doing so, did act under a mistake of law, in this: that no lands were coal lands unless there was proof that coal, in sufficient quantities to make the land chiefly valuable therefor, was known to exist on each smallest legal sub-division of said lands, and that no evidence would be regarded by him as tending to establish the fact that the aforesaid lands were coal lands, unless it was demonstrated by such evidence that there were actual outcrops of coal on each legal sub-division, or by tunnels used in connection with an open mine; whereby, in consequence of these mistakes of said Commissioner, all of said mineral lands were, without authority of law, and contrary to the express provisions of law, illegally certified to the State of Utah, as aforesaid.

Your orator further shows that Peter N. Campbell, as a citizen of the State of Massachusetts, and resides at Springfield in the State of Massachusetts, and claims to have a lien on a portion of the aforesaid lands, by reason of a mortgage made and executed to him by the Carbon County Land Company, defendant herein, and that said Peter N. Campbell [fol. 182] cannot be found within the State and District of Utah, and that service of process cannot be made upon him within the State of Utah, and that this action is an action wherein the complainant claims the equitable title to all of the aforesaid lands.

Your orator further shows that Harley O. Milner, defendant herein, who made an application for the purchase of the lands hereinabove described, as having been applied for by him, through his agent, Stanley B. Milner, is a citizen of the State of Idaho, and resides at Milner, in the State of Idaho, and cannot be found within the State and District of Utah, and that he has, or claims to have, some interest or title in or to the aforesaid lands applied for by him, and that service cannot be made upon the said Harley O. Milner within the State of Utah.

Your orator further shows that the last will and testament of the said Stanley B. Milner, deceased, has been admitted to probate, and that the said Truth A. Milner has duly qualified and is now acting as sole executrix of his estate.

In consideration whereof, and forasmuch as the complainant is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity where matters of this kind are cognizable and reviewable; to the end therefore that the defendants may full, true, direct and certain answer make to each and all of the allegations and averments in this bill contained, but not under oath (answers under oath being hereby expressly waived) your orator humbly prays:

First. That this Honorable Court adjudge and decree that Stanley B. Milner, Truth A. Milner, Harley O. Milner, Samuel H. Gilson, and the Carbon County Land Company, nor either of them, ever acquired any right, title or interest in or to the lands described in this Bill of Complaint by reason of any of the said contracts made between themselves and the State of Utah:

Second. That this Honorable Court adjudge and decree that said contracts made and entered into between the said defendants and the said State of Utah, are void, and that each be surrendered for cancellation.

Third. That the said Carbon County Land Company, defendant herein, acquired no right, title or interest in or to any of the lands described in this Bill of Complaint, by reason of the said assignments and transfers of said contracts, to-wit, by any of the other defendants herein.

[fol. 183] Fourth. That the defendants and each of them be adjudged and decreed and directed to surrender up to the State of Utah for cancellation, any and all contracts and agreements they or any of them now have with the State of Utah, for any of the lands described in this Bill of Complaint.

Fifth. That an order be made directing and requiring the said defendants Peter N. Campbell, of Springfield, Massachusetts, and Harley O. Milner, of Milner, Idaho, to appear and plead on a day certain, to be fixed by this Honorable Court.

Sixth. That it be adjudge dand decreed that the said Peter N. Campbell, defendant herein, acquired no lien upon, or claim to any of the said described lands and premises by reason of said or any mortgage given to said Peter N. Campbell by the said Carbon County Land Company.

Seventh. That your orator have such other, further or different relief in the premises, as may be agreeable to equity and good conscience.

May it please the Court, to grant unto your orator a writ of subpœna, therein and thereby commanding the said defendants Truth A. Milner, as executrix of the estate of Stanley B. Milner, deceased, Truth A. Milner, Samuel H. Gilson, and the Carbon County Land Company, to be and appear before this Honorable Court, on a day to be therein named, then and there to abide and perform such decree as the Court shall make in the premises, and as shall be agreeable to equity and good conscience; and your orator will ever pray.

Charles J. Bonaparte, Attorney General; Hiram E. Booth, U. S. Attorney for the District of Utah, Solicitors for Complainant. M. C. Burch, Asst. Atty. Gen'l; Fred A. Maynard, Asst. to the Atty. Gen'l, of Counsel.

Filed January 7, 1907. Jerrold R. Letcher, Clerk.

[fol. 184] Thereupon the second amended Bill of Complaint in said cause was read in evidence as follows:

OFFER IN EVIDENCE

"IN THE CIRCUIT COURT OF THE UNITED STATES, EIGHTH CIRCUIT IN AND FOR THE DISTRICT OF UTAH

In Equity

UNITED STATES OF AMERICA, Complainant,

vs.

TRUTH A. MILNER, Executrix of the estate of Stanley B. Milner, Deceased; Truth A. Milner, Samuel H. Gilson, Carbon County Land Company, a Corporation, and Peter N. Campbell, Defendants.

Second Amended Bill of Complaint

To the Honorable Judges of the Circuit Court of the United States for the Eighth Circuit in and for the District of Utah:

"The United States of America, complainant herein, by Charles J. Bonapart, its Attorney-General, brings this its second amended bill of complaint against Truth A. Milner, executrix of the estate of Stanley B. Milner, deceased, who was, at the time of his death, a citizen of the State of Utah, residing in Salt Lake City, Salt Lake County, in said State of Utah, wherein his estate is now being administered; Truth A. Milner, a citizen of the State of Utah, residing at Salt Lake City, in the State of Utah; Samuel H. Gilson, a citizen of the State of Utah, residing at Salt Lake City, State of Utah; Carbon County Land Company, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, a citizen of the State of Utah, with its office and principal place of business in Salt Lake City, State of Utah, and Peter N. Campbell, a citizen of the State of Massachusetts, and residing at Springfield, in the State of Massachusetts, defendants; and thereupon your orator complains and alleges:

1. That the Carbon County Land Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business and office in Salt Lake City, in the State of Utah.

2. That on the first day of January, A. D. 1900, complainant was the owner in fee, in the possession and entitled to the possession of the following described tracts of land, all situate in Carbon County, in the State of Utah, which said lands, on the day of year aforesaid were vacant and unreserved and unappropriated, and were rough and broken in character, and unfit for agricultural purposes, and of slight, if [fol. 185] any, utility for grazing purposes, but all of said lands, at said time, were well-known coal lands, and chiefly valuable for their coal deposits, and were at said time of the value of more than one hundred thousands dollars on account of their valuable coal deposits; that said lands are described as follows, to wit:

"The northwest quarter (¼), the southeast quarter (¼), of section twenty-two (22); the east half (½) of section

twenty-seven (27); the south half (½) of section thirty-three (33); all of section thirty-four (34); the south half (½) of section thirty-five (35), in township twelve (12) south, range eleven (11) east Salt Lake Meridian, containing 1920 acres.

"The north half (½) of section twenty-six (26), a township twelve (12) south, range eleven (11) east, Salt Lake Meridian, containing 320 acres.

"The north half (½) of section thirty-three (33), township twelve (12) south, range eleven (11) east, Salt Lake Meridian; Lots one (1), two (2), three (3) and the southeast quarter (¼) of the southeast quarter (¼) of section three (3), township thirteen (13) south, range eleven (11) east, Salt Lake Meridian, containing 477.04 acres.

"All of sections one (1) and three (3); the north half (½) of section ten (10); the north half (½) of section eleven (11); the north half of section twelve (12); township thirteen (13) south, range ten (10) east, Salt Lake Meridian, containing 2244.24 acres.

"The southeast quarter (¼) of section twelve (12); the east half (½) of the northeast quarter (¼) of section fourteen (14), township thirteen (13) south, range ten (10) east; Lot one (1); the northeast quarter (¼); the northeast quarter (¼) of the northwest quarter (¼); the north half (½) of the southeast quarter (¼); the southeast quarter (¼) of the southeast quarter (¼) of section seven (7), in township thirteen (13) south, range eleven (11) east, Salt Lake Meridian, containing 603 acres, making a total amount of 5564.28 acres, all situated in the County of Carbon, in the State of Utah.

3rd. Your orator further shows that Utah was admitted into the Union by the act of Congress, entitled 'An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original states,' approved July 16th, 1894. By said Act the State of Utah was granted, by complainant, [fol. 186] upwards of one million acres of land for the establishment and maintenance of State schools, asylums, institutions and other State purposes, which lands were to be selected by the State, under the direction of the Secretary of the Interior, from the unappropriated non-mineral and non-coal lands of the complainant, and were to be dis-

posed of exclusively for the purposes named in said act, in such manner as the Legislature of the State should provide.

"That no mineral lands were granted to said State of Utah by said Act of Congress excepting saline lands.

"In the year 1896 the Legislature of said State created a Board of Land Commissioners which was given direction, management and control of the lands granted to the State by complainant, and said Land Board was empowered to sell the same; in accordance with the provisions of said Act and the Constitution of the State, said Board was authorized to cause all the public lands granted to the State, to be selected and registered, and after the Board should have so selected and numbered the same it became its duty to take such action as necessary to secure the approval of complainant and a final transfer of said selected lands from complainant to said State.

"Your orator further shows that the only lands which the State of Utah was authorized to select and obtain title to from complainant, were surveyed, unappropriated, unreserved non-mineral lands (excepting saline lands, which were expressly granted to the said State of Utah), and no officer of complainant had authority to transfer the title of complainant to said State to any public lands that had been appropriated or reserved, or any mineral lands, or any coal lands, or lands classified as mineral lands.

"4th. Your orator further shows that the only way by which heretofore particularly described said lands could be legally procured from complainant was through compliance with an Act of Congress entitled 'An act to provide for the sale of lands of the United States containing coal,' which Act was approved March 3rd, 1893, and is in part as follows:

'1. Sec. 2347. Every person above the age of 21 years, who is a citizen of the United States, or who has declared his intention to become such, or an association of persons, severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivision, any quantity of vacant coal lands of [fol. 187] the United States, not otherwise appropriated, or reserved by competent authority, not exceeding 160 acres to such individual person, or 320 acres to such association,

upon payment to the Receiver or not less than ten dollars per acre for such lands, where the same shall be situated more than 15 miles from any completed railroad, and not less than $20.00 per acre for such lands as shall be within fifteen miles of such road.

'2. Sec. 2348. Any person or association of persons severally qualified as above provided, who have opened and improved, or shall hereafter open and improve any coal mine or mines upon public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry under the preceding section of the mines so opened and improved, provided, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding 640 acres, including such mining improvements.

'3. Sec. 2349. All claims under the preceding section may be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by filing a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the 3rd day of March, 1873, sixty days from the expiration of three months shall be allowed for the filing of the declaratory statement, and no sale under the provisions of this section, shall be allowed until the expiration of six months from the 3rd day of March, 1873.

"4. Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person, or association of persons, and no association of persons, any member of which shall have taken the benefit of said sections, either as individuals or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections, shall enter or hold any of the lands under their provision; and all persons claiming under section 2348 shall be required to prove their re-

spective rights, and pay for the land filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall [fol. 188] be subject to entry by any other qualified applicant.

"5th. Your orator further shows that during the life time of Stanley B. Milner, and on and prior to December 10th, 1900, the said Stanley B. Milner formed a plan and scheme to obtain the title to the aforesaid coal lands without a compliance with the Act of Congress aforesaid relating to coal lands, and without paying the price fixed by complainant for lands chiefly valuable for coal, and with the fraudulent purpose and intent to obtain said coal lands as cheaply as possible, and with the fraudulent purpose and intent of obtaining a larger acreage of coal lands than he could otherwise obtain under said coal land laws, which scheme was formed and entered into with the fraudulent intent and purpose to defraud the United States of America out of the title to and possession and use of the aforesaid coal lands, that said plan and scheme so formed by the said Stanley B. Milner was to be carried out in the following manner, to-wit: the officers of said State Board of Land Commissioners, to select said lands as grazing lands and as agricultural lands, and to induce and obtain the said officers of said State Board of Land Commissioners of the said State of Utah to represent to complainant that the aforesaid lands were grazing lands and chiefly valuable for grazing and agricultural purposes, and not valuable as mineral lands, and in this way and manner to induce said officers of said State Board of Land Commissioners to select said lands, under the aforesaid grant of lands made to the State of Utah, in said Enabling Act admitting Utah into the Union, to have said lands listed and certified to the said State of Utah as non-mineral lands; and to induce the said officers of said State Board of Land Commissioners to sell the said lands to the said Stanley B. Milner, and to other persons selected by him to purchase said lands for and in his behalf, at a cheap price and on long-time payments.

"6: That in pursuance of said fraudulent scheme and plan formed by the said Stanley B. Milner to obtain the aforesaid described lands as non-mineral lands, the said

Stanley B. Milner, during his lifetime, and on or about December 10th, 1900, filed an affidavit and an application with the said State Board of Land Commissioners of the State of Utah, to purchase the following portion of said described lands, to-wit:

"Northwest quarter (¼) and southeast quarter (¼) section twenty-two (22); east half (½) section twenty-seven (27); south half (½) section thirty-three (33); all of section thirty-four (34); south half (½) section thirty-five, town- [fol. 189] ship twelve (12) south, range eleven (11) east Salt Lake Meridian, 1920 acres; and

"That in making said application for the purchase of said lands, the said Stanley B. Milner was required by the said State Board of Land Commissioners of the said State of Utah to enter into and did enter into an agreement for the purchase of said lands, which agreement so made and entered into between the said Stanley B. Milner and the said State of Utah, contained among other things the following express provisions: 'that if said lands shall hereafter be determined to be mineral in character, or if any person other than the State, shall be determined to have a superior right or claim to said land, then, in either of said events, the State of Utah shall be released from all obligations under this agreement.' And it is further stated in said agreement that said lands were grazing lands, that said agreement was in the form of an affidavit and was subscribed and sworn to by said Stanley B. Milner; and attached to said agreement, and made a part of the same was the following affidavit:

" 'State of Utah,
County of Salt Lake, ss:

" 'Stanley B. Milner, being duly sworn according to law deposes and says; that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described lands, and with each and every legal subdivision thereof, having, frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard therto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or

any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit; that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes, under the local customs and rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral lands, but with the object of se- [fol. 190] curing land for agricultural purposes. That the land is not occupied and improved by an Indian;

which affidavit was subscribed and sworn to by the said Stanley B. Milner as a part of his application to purchase the aforesaid lands; that at the time of making the foresaid agreement, application to purchase and affidavit, as aforesaid, the same Stanley B. Milner well knew that said lands were chiefly v-luable for the coal deposits therein, and the said agreement, application and affidavit, as aforesaid, was false and fraudulent as hereinafter shown, and was fraudulently made for the express purpose of obtaining title to coal lands, and not for the purpose of securing said land for agricultural purposes, or for grazing purposes.

"7th. And your orator further shows that for the same fraudulent purpose and intent as hereinbefore stated, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, on or about April 1st, 1901, filed a similar application and agreement and affidavit with the State Board of Land Commissioners to purchase the following described tract of land, to-wit:

"North half (½) section twenty six (26), township twelve (12) south, range eleven (11) east, Salt Lake Meridian, 320 acres; and that said application, agreement and affidavit was in the same form as that heretofore mentioned as having been made by the said Stanley B. Milner for himself, and was subscribed and sworn to by the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, and said affidavit was false and fraudulent in the particulars as hereinafter shown, and was made with the fraudulent purpose and intent of obtaining title to said coal lands, and not for the pur-

pose of securing said lands for agricultural purposes, and your complainant alleges that said lands were a portion of the lands first above described and were well known coal lands and chiefly valuable for the coal deposits therein.

"8th. Your orator further shows that on or about March 29th, 1902, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, filed a like application, agreement and affidavit for the purchase of the following described lands, to-wit:

"North half (½) section thirty-three (33); township twelve (12) south, range eleven (11) east; Lots one (1), two (2), three (3) and southeast quarter (¼) of southeast quarter (¼) section three (3), township thirteen (13) south, range eleven (11) east, Salt Lake Meridian 477.04 acres; and that said affidavit and agreement was false and [fol. 191] fraudulent in the particulars hereinafter shown, and was made with the fraudulent purpose and intent of obtaining title to coal lands, and not with the object of securing said lands for agricultural or grazing purposes; that said lands are chiefly valuable for the coal deposits therein, and were at said time well known coal lands, and are a portion of the lands first above described.

"9th. Your orator further shows that said Stanley B. Milner, on or about March 17th, 1903, made an application, agreement and affidavit in a like form as heretofore alleged, as the agent of Harley O. Milner, of Milner, Idaho, to purchase the following described lands, to-wit:

"All of sections one (1) and three (3); north half (½) section 10; north half (½) section eleven (11); north half (½) section twelve (12), township thirteen (13) south, range ten (10) east, Salt Lake Meridian, 2244.24 acres. Which lands were a part of the lands first above described, and that the affidavit, application and agreement was in the same form as hertofore alleged, and said agreement and affidavit was false and fraudulent in the particulars as hereafter shown, and was made with the fraudulent purpose and intent to obtain title to coal lands, and not with the object of securing said lands for agricultural or grazing purposes; and complainant further alleges that said lands were purchased for the use and benefit of Harley O. Milner; and that the said Stanley B. Milner furnished the money to purchase said lands from said State of Utah,

and with the understanding and agreement with the said Harley O. Milner that when the title thereto should be obtained from the said State of Utah that the said land should be transferred to the said Stanley B. Milner, or to some corporation, the capital stock of which was owned by the said Stanley B. Milner.

"10th. Your orator further shows that on or about September 14, 1903, the said Stanley B. Milner, in further pursuance of said scheme to defraud the United States, did persuade and induce one Samuel H. Gilson to file an application and obtain an agreement to purchase from the said State of Utah, the following described lands:

"The southeast quarter (¼) of Section twelve (12); the east half (½) of the northeast quarter (¼) of section fourteen (14), township thirteen (13) south, range ten (10) east; Lot one (1); the northeast quarter (¼); the northeast quarter (¼) of the northwest quarter (¼); the north half (½) of the southeast quarter (¼) the southeast quarter (¼) of the southeast quarter (¼) of section seven [fol. 192] (7), in township thirteen (13) south, range eleven (11) east, Salt Lake Meridian, containing 603 acres; which lands are a portion of the lands first above described; that said application, agreement and affidavit was in the form heretofore alleged, and which affidavit was subscribed and sworn to by the said Samuel H. Gilson for the fraudulent purpose of obtaining title to coal lands, and not with the object of securing said lands for agricultural purposes, and which affidavit and agreement was false and fraudulent in the particulars as hereinafter shown, and was known to be false and fraudulent by said Samuel H. Gilson at the time said affidavit was sworn to by said Gilson.

"11th. And your orator further shows that prior to the making of said agreements, affidavits and applications to purchase said lands from said State of Utah, through the said State Board of Land Commissioners, the said Stanley B. Milner had employed expert geologists and engineers to make an examination of the lands above described, and he himself, with the aid and assistance of the defendant, Samuel H. Gilson, who is a man of large experience in the selection of coal lands, had thoroughly examined each subdivision of the aforesaid lands, and said Milner and said

Gilson had discovered that said lands were underlaid with vast deposits of valuable coal, and that all of the aforesaid lands were chiefly valuable for the coal deposits contained therein, and were of little or no value for any other purpose, and so knowing he determined and planned to obtain the title and possession of said coal lands, with the aid and assistance of said Truth A. Milner, Harley O. Milner, and said Samuel H. Gilson, with the purpose and intent of cheating and defrauding the United States; and in pursuance of said fraudulent intent and purpose to defraud the United States out of the title and possession of the aforesaid lands, the said Stanley B. Milner and the said Samuel H. Gilson made the aforesaid affidavits well knowing at said time that the same were false and fraudulent in this; That the said lands did contain large deposits of coal, and that said lands were essentially non-mineral lands, etc. as stated in said affidavits, and that the said application to purchase the lands by the said Samuel H. Gilson aforesaid, was made for the use and benefit of the said Stanley B. Milner, and not for the said Samuel H. Gilson, and the money to purchase the same was furnished by the said Stanley B. Milner, and not by the said Samuel H. Gilson; and both said Stanley B. Milner and the said Samuel H. Gilson well knew at the time that all of said lands were applied for the State of Utah that the same were well known coal [fol. 193] lands, chiefly valuable for the deposits of coal therein, and were not either grazing or agricultural lands.

"12th. And your orator further shows that the said State Board of Land Commissioners did not in fact make such examination, or any investigation as to the character of said lands to determine whether the same were mineral, or coal lands, or non-mineral and non-coal lands, nor as to whether said lands were or were not grazing or agricultural lands, and did not do this, either as a collective body, or by one or more of its members or officers, or its agents, or agent, or by means of any person or persons employed or procured by it as agents for such purpose, but, on the contrary, acted solely on the representations of the said Stanley B. Milner and said Samuel H. Gilson, defendants herein, as aforesaid, to procure said lands for it, which representations, in the cases hereinbefore set forth and concerned in this suit, were not only interested and biased

but false and fraudulent in these essential particulars; that the said Stanley B. Milner, Truth A. Milner, Harley O. Milner and said Samuel H. Gilson, did not seek to obtain said lands for either grazing or agricultural purposes, as they represented, as aforesaid, but did seek to obtain said lands for coal mines; and also, in that the aforesaid persons represented that they were not mineral or coal lands, when in fact said lands were mineral coal lands, and were sought to be obtained by the aforesaid defendants for the certainty that they were coal lands.

"As the result of said false and fraudulent representations of said defendants making said affidavits, said State Board of Land Commissioners were induced to and did enter into contracts in writing with said applicants and that upon compliance with certain conditions, not material or necessary herein to be set forth, said State Board of Land Commissioners, would select the lands applied for, and when the State of Utah should have obtained title to the same, would sell to said applicants said land, at private sale, for the sum of $1.50 per acre or thereabouts.

"And your orator further shows that said State Board of Land Commissioners appointed its President and Secretary as its agents to attend to the details of its business, and to investigate the lands involved in said applications to purchase, as well as to obtain certain certified selections from complainant of lands provided for by the grant aforementioned, and so it was, that said President and Secretary, in the supposed performance of their duties, appointed the applicants, defendants herein, as aforesaid, as agents of said Board, to examine and investigate as to the [fol. 194] character of the lands; whereupon said defendants Stanley B. Milner, and Samuel H. Gilson, as your orator is informed and believes and therefore alleges, duly reported that they had investigated and found said lands to be non-mineral and non-coal and chiefly valuable for agricultural purposes.

"Your orator further shows, that at the time when said several applications were made, it was a known rule of complainant's General Land Office, that no Register or Receiver of any land office in the mineral States would accept an entry of non-mineral land, unless accompanied by a non-mineral affidavit based upon the personal knowledge of the entryman, and this rule applied in full force to

selections when made by the State of Utah, under the grant to it by said Act of Congress. But, notwithstanding said known rules, said State Board of Land Commissioners of the State of Utah, by its president and secretary, as selecting agents, did not comply with the same, as appears from the several affidavits accompanying the several lists in which the aforesaid lands are included. Your orator avers that the only affidavits furnished by said State Board of Land Commissioners to said Register and Receiver, accompanying said lists respectively, was one in each case in effect and practically the same in all cases, because a printed form was made use of, which was in substance and effect as follows, to-wit:

"STATE OF UTAH,
County of Salt Lake, ss:

"We, —— ——, authorized agents of the State Board of Land Commissioners of the State of Utah, being first duly sworn, depose and say: That the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under section — of an Act of Congress entitled: 'An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on a footing with the original States', approved July 16th, 1894. That all of said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employees of the State, as to their mineral or agricultural character; that there is not to our knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to our knowledge any placer, cement, gravel, gilsonite, elaterite, asphaltum, or other valuable mineral [fol. 195] deposit; that the land contains no salt spring or deposit of salt in any form sufficient to render it valuable therefore; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise, that no portion of said land is worked for minerals during any part of the year by any person or persons; that said lands is essentially non-mineral land, and that

our application therefore is not made for the purpose of fraudulently obtaining title to mineral lands, but with the object of securing said land for agricultural purposes; and the above and foregoing statements as to the character of said land applied to each and every legal sub-division thereof. That the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named.'

"These so-called affidavits were in each case subscribed by the President and Secretary, as agents for the said State Board of Land Commissioners, and were sworn to by said officers before a Notary Public.

"Your orator further shows that the Register and Receiver of complainant's Land Office at Salt Lake City, within whose district the lands herein concerned are situated received from the said State Board the list containing descriptions of lands involved herein, and forwarded these, as was their duty, to the Commissioner of Complainant's General Land Office, but so it was, as your orator avers and charges, that the officials and the employes of said General Land Office were unduly impressed by the fact that the State of Utah was applicant for such lands, and had no knowledge or suspicion that said President and Secretary, acting as agents of the State Board, had contract to sell said lands in advance, and did not know no employee or agent of the State of Utah had investigated and examined said lands, and that said examination, if any was made, had been entrusted to the very persons who had been procured to defraud complainant of its lands in the interest of the defendants, and that whatever action said persons did take was for the purpose of defrauding and falsely representing to said State Board of character and conditions of said lands, to enable said State Board to have some foundation of fact upon which to base their direct, positive and unequivocal assertions on oath; that the State of Utah, being so impressive in its functions, as applicant for portions of the land Grant by Congress for beneficial purposes to said state, the officers and employes of said General Land Office were led to believe in the regularity, honesty and good faith of said State, and to overlook the fact [fol. 196] that upon the face of each and every one of said printed, sworn statements it was made certain that the affiants had no personal knowledge of that which they posi-

tively asserted, and no knowledge of which gave force to that asserted in negative form, and that as a showing for the certification said statements had no legal force or efficiency whatever, and contain nothing upon which the mind of the Commissioner of the General Land Office could act, or his judgment could be founded, in attempting to determine whether in fact said lands were mineral or non-mineral, coal or non-coal, and hence your orator avers that whatever action said Commissioner did take in certifying said lands to said State was without jurisdiction and wholly void, and did not avail to pass titles from complainant to the State of Utah to the lands herein concerned.

"13. And your orator further shows that the said officers and agents of said State Board of Land Commissioners being thus deceived by the false affidavits of said applicants and having no other information as to the character of said lands, and relying entirely upon the statements made in the said affidavits of said applicants, and not knowing the same to be false and fraudulent, did make the non-mineral affidavit and the affidavit that said lands did not contain any deposits of coal, as set out in full herein, and did file their said affidavit attached to the lists of lands selected by the State of Utah, which are the same lands as described in this bill of complaint, and filed the said affidavit as aforesaid with the said Register and Receiver of the land office at Salt Lake City, Utah; that the Register and Receiver of complainant's Land Office at Salt Lake City, Utah, were each deceived by the aforesaid affidavits of the agents for the State Board of Land Commissioners, as aforesaid, and having no evidence as to the character of said lands did rely entirely upon the affidavits aforesaid of said agents for the State Board of Land Commissioners, of the State of Utah, and the said Register and Receiver of said Land Office did certify to the Commissioners of the General Land Office among other things that 'the same are not, nor is any part thereof returned and denominated as mineral lands, and did allow and approve said lists of said lands made by said State of Utah on account of the evidence contained in the affidavit of said President and Secretary of said State Board of Land Commissioners of the State of Utah as agents therefor; and the said Register and Receiver did

forward the said affidavits with lists of said lands together with their certificate of allowance and approval, based upon the false evidence aforesaid, to the Commissioner of your complainant's General Land Office at Washington, D. C.; [fol. 197] and the said Commissioner of the general Land Office of complainant in passing upon the character of the lands mentioned in said lists relied entirely upon the statements made in said affidavits of the agents of said State Board of Land Commissioners that said lands were essentially non-mineral in character and contained no deposits of coal, and the Certificate of the Register and Receiver of the said land office, which was attached to said lists approving the same, and had no other knowledge of the character of said lands; and the Commissioner of your complainant's General Land Office was thereby deceived as to the character of said lands and not knowing that said lands were coal lands, certified all of said lands described in this bill of complaint to the said State of Utah being lands of the character contemplated in said grant, when in fact said lands were not of the character contemplated by the said Grant; that had it been known by the said Register and Receiver of the Land Office at Salt Lake City, Utah, or said Commissioner of complainant's General Land Office that said lands were coal lands and chiefly valuable for the coal deposits contained therein, said lists would not have been allowed and approved, nor so certified by the said commissioner of complainant's General Land Office to the State of Utah.

"That the foregoing contains all the evidence that was before the Register and Receiver of the Land Office at Salt Lake City, Utah, and all the evidence that was before the Commissioner of the General Land Office as to the character of said lands, so listed and certified to the state of Utah and described in this second amended bill of complaint.

"14. Further complaining your orator shows that the Congress of the United States passed an Act which was approved August 3, 1854, R. S. Section 2449, which has ever since been, and is now, in force, providing as follows: 'Where lands have been, or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee simple title of the lands, or require patents to be issued

therefor, the lists of such lands which have, or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals, or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists, that are of the character contemplated by such Act of Congress, and intended to be granted thereby; and where lands embraced in such lists are not of the character embraced by such Act of Congress, and are not intended to be granted thereby, the list, so far as these lands are con- [fol. 198] cerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby.'

"And your orator further shows that in obedience to said law it became and was the duty of the then Commissioner for the want of proof that the lands named and described in said lists of selections, were of the character contemplated by said Acts of Congress, to with-hold his certificate, and return them to the local land officers of complainant, but either through inadvertence, mistake, clear error of law, or deception as to the character of said lands as aforesaid, said Commissioner did approve said list, and under his hand and seal did endorse his certificate thereon.

"15th. And your orator further avers and charges that neither in equity and good conscience, nor in law, were the said lists of land, although so certified, available to convey any right, title, claim or interest, from complainant to the State of Utah, to any of the lands herein concerned, because the State of Utah, while not as a government, or a collective body so intending, was by and through the failure of certain of its officers and agents to safeguard its interests as hereinbefore described, made to appear as an active party to a gross fraud upon complainant in a matter in which the complainant had been bestowing a gift or grant to said State, and had been made the most potential factor in such fraud though in small sense the beneficiary thereof, and because the Commission of complainant's General Land Office acquired no jurisdiction to act upon such State's application to have said lists so certified by reason of the terms of the Act of Congress above set forth, and because the officials of complainant, the Register and Receiver of the said Land Office and the Commissioner of General Land Office were each deceived by the false affidavits aforesaid.

"16th. Your orator further shows that the application for the land first applied for by Stanley B. Milner, on December 10, 1900, as above described, was approved by the State of Utah on December 17, 1900; and said land was selected by said State and said selection approved by the United States Land Office of the District of Utah on December 18, 1900, and certified to the State of Utah by the General Land Office on June 22, 1901; the price agreed to be paid was $1.50 per acre, or a total consideration of $2,880.00, payable in ten annual payments; that the defendant, Peter N. Campbell of Springfield, Massachusetts, claims to have a mortgage lien on said land for the sum of $25,000.00 on account of a mortgage given by the said Carbon [fol. 199] County Land Company on or about February 26, 1904.

"That the application for the land applied for by Truth A. Milner, by Stanley B. Milner, her agent in application dated April 19, 1901, above described, was approved by the State of Utah April 22, 1901; and selected by said State, which selection was approved by the United States Land Office at Salt Lake City, Utah, April 29, 1901, and certified to the State of Utah by the General Land Office December 23, 1901. That the price agreed to be paid the State therefor was $1.50 an acre, or a total consideration of $480.00 to be paid in ten annual payments.

"That the second application for the land herein described applied for by Truth A. Milner, through her Agent, Stanley B. Milner, as aforesaid, was approved by the State of Utah April 2, 1902; and said land was selected by the State of Utah, which selection was approved by the United States Land Office at Salt Lake City, Utah, April 7, 1902 and certified to the State of Utah by the General Land Office July 9, 1903. The price agreed to be paid was $1.50 per acre, and to be paid in ten annual payments.

"That the application for land applied for by Samuel H. Gilson, as aforesaid, was approved by the State of Utah December 15, 1903; said land was selected by the State of Utah, which selection was approved by the United States Land Office at Salt Lake City, Utah, September 17, 1903, and certified to the State of Utah by the General Land Office December 1, 1904. The price agreed to be paid the State therefor was $1.50 an acre, or a total consideration of $904.50, to be paid in ten annual payments.

"That the State Board of Land Commissioners of the State of Utah entered into said contracts to sell all of said described lands to the said Milners and the said Gilson, and incorporated the description of said lands in the lists prepared for lands granted to the State of Utah by said Act of Congress of July 16, 1894, and thereafter said Commissioner of the General Land Office approved the said lists submitted by the State of Utah containing the above descriptions, and thereafter certified said lands, with other lands, to the State of Utah.

"17. Your orator further shows that no patents from the State of Utah to said defendants have ever been issued for any of said lands, but payments as required under said contracts, have been made as therein provided.

[fol. 200] "Your orator further shows that said Stanley B. Milner died at Salt Lake City, Utah, on or about the 2nd day of May, 1908, and left his last will and testament, and by said last will and testament devised and bequeathed all of his property, both real and personal, to the said Truth A. Milner, his wife, and by said last will and testament made her the sole executrix; and said will has been admitted to Probate in the District Court of the State of Utah in and for Salt Lake County, and said Truth A. Milner has duly qualified and is now acting as sole executrix of his estate.

"18th. Your orator further shows that as a part of the scheme to fraudulently obtain said above described coal lands, the said Stanley B. Milner, in his life time, caused to be organized, under the laws of the State of Utah, a corporation known as and called the Carbon County Land Company, which corporation was duly organized as aforesaid, under the laws of the State of Utah, and all of the stock of which was owned by the said Stanley B. Milner at the time of his death, except an insignificant number of shares given to persons solely for the purpose of enabling said corporation to be formed, and your orator further shows, upon information and belief, that as a part of the scheme to defraud your complainant as aforesaid, all of the aforesaid agreements to purchase the lands aforesaid from the State of Utah have been assigned and transferred to the said Carbon County Land Company, defendant herein.

"Your orator further shows that all the payments that have been made by the said Milners and the said Gilson, on the said contracts, were all made with the moneys furnished by the said Stanley B. Milner, during his life time, or some one acting for him and in his behalf, or by his estate since his death; that the sole purpose and intent of said defendants, in making said applications to purchase said lands and said agreements, was to acquire the title and possession of said lands in the interest of and for the benefit of the said Stanley B. Milner, and in pursuance of said understanding and agreement, as your orator is informed and believes, said assignments and transfers of said contracts have been made to the said Carbon County Land Company, defendant herein, all of the stock of which is owned by said Truth A. Milner, as the sole legatee of the said last will and testament of said Stanley B. Milner, deceased, excepting a few shares to enable other persons to qualify as officers and directors of said Carbon County Land Company.

"19. Your orator further shows that Peter N. Campbell is [fol. 201] a citizen of the State of Massachusetts and resides at Springfield, in the State of Massachusetts, and claims to have a lien on a portion of the aforesaid lands by reason of a mortgage made and executed to him by the Carbon County Land Company, defendant herein, and that Peter N. Campbell cannot be found within the State and District of Utah, and that service of process cannot be made upon him within the State of Utah, and that this action is an action wherein the complainant claims the legal and equitable title to all of the aforesaid lands.

"In Consideration Whereof, and forasmuch as the complainant is remediless in the premises at and by the strict rules of the common law, and is only relievable in a court of equity where matters of this kind are cognizable and reviewable; to the end therefore that the defendants may full, true, direct and certain answer make to each and all of the allegations and averments in this second amended bill contained, but not under oath (answers under oath being hereby expressly waived), your orator humbly prays:

"First. That this Honorable Court adjudge and decree that neither Stanley B. Milner, Truth A. Milner, Harley O.

Milner, Samuel H. Gilson, and the Carbon County Land Company, nor either of them, ever acquired any right, title or interest in or to the lands described in this amended bill of complaint by reason of any of said contracts made between themselves and the State of Utah.

"Second. That this Honorable Court adjudge and decree that said contracts, made and entered into between the said defendants and said State of Utah, are void, and that each be surrendered for cancellation.

"Third. That the said Carbon County Land Company, defendant herein, acquired no right, title or interest in or to any of the lands described in this amended bill of complaint, by reason of the said assignments and transfers of said contracts, to-wit, by any of the other defendants herein.

"Fourth. That the defendants, Truth A. Milner, Samuel H. Gilson and Carbon County Land Company, and each of them, be directed by a proper decree, to surrender up to the State of Utah for cancellation any and all contracts and agreements they or any of them now have with the State of Utah, for any of the lands described in this amended bill of complaint.

"Fifth. That an order be made directing and requiring the said defendant, Peter N. Campbell, of Springfield, Mas- [fol. 202] sachusetts, to appear and plead on a day certain to be fixed by this Honorable Court.

"Sixth. That it be adjudged and decreed that the said Peter N. Campbell, defendant herein, acquire no lien upon or claim to any of said described lands and premises by reason of any mortgage given to said Peter N. Campbell by said Carbon County Land Company.

"Seventh. That your complainant have such other, further or different relief in the premises as may be agreeable to equity and good conscience.

"May it please the court to grant unto your orator a writ of subpœna, therein and thereby commanding the said defendants, Truth A. Milner as executrix of the estate of Stanley B. Milner, deceased, Truth A. Milner, Samuel H. Gilson, and the Carbon County Land Company, to be and appear be-

fore this Honorable Court on a day to be therein named then and there to abide such decree as the court shall make in the premises and as shall be agreeable to equity and good conscience, and your orator will ever pray.

(Signed) Charles J. Bonaparte, Attorney General of the United States; (Signed) William M. McCrea, Assistant U. S. District Attorney for the District of Utah, Solicitors for Complainant. M. C. Burch, Fred W. Maynard, of Counsel.

Received a copy of the foregoing amended bill this 26th day of September, A. D. 1907.

Allen T. Sanford, Atty. for Defendants. H. D. Seward, Atty. for Peter N. Campbell.

"Filed September 26, 1907. Jerold L. Letcher, Clerk. M. Margaret B. Connell, Deputy.

OFFER IN EVIDENCE

IN THE CIRCUIT COURT OF THE UNITED STATES, EIGHTH CIRCUIT, IN AND FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Complainant,

vs.

TRUTH A. MILNER, Executrix of the Last Will and Testa- [fol. 203] ment of Stanley B. Milner, Deceased; Truth A. Milner, Samuel H. Gilson, Carbon County Land Company, a Corporation, and Peter N. Campbell, Defendants

Joint and Several Answer of Truth A. Milner, Executrix of the Last Will and Testament of Stanley B. Milner, Deceased; Truth A. Milner, Samuel H. Gilson, and Carbon County Land Company, a Corporation

Come now the defendants, Truth A. Milner, executrix of the estate of Samuel B. Milner, deceased, Truth A. Milner, Samuel H. Gilson and Carbon County Land Company, a corporation, and now and at all times hereafter saving to themselves and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors,

uncertainties and imperfections in said bill contained, for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, severally answering say:

1. Admit that the Carbon County Land Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah with its principal place of business and office in Salt Lake City, in the State of Utah.

2. Admit that on the 1st day of January, 1900, complainant was the owner in fee, in the possession, and entitled to the possession of all of the tracts of land described in paragraph 2 of complainant's complaint, and that on said day and year aforesaid said lands were all vacant and unreserved and unappropriated, but these defendants deny that the said lands, or any part or portion thereof were rough or broken in character or unfit for agricultural purposes or of slight utility for grazing purposes, or that said lands or any of them at said time, or at any other time or at all, were well or at all known coal lands or chiefly or at all valuable for their coal deposits or were at said time or at any other time or at all of the value of more than $100,000.00 or of any other value in excess of the sum of $1.50 per acre on account of their coal deposits or by reason of any other fact, matter or thing whatsoever, but on the contrary these defendants state that said lands described in paragraph 2 of complainant's complaint and every part and portion thereof were on the 1st day of January, 1900, and at all times since have been non-mineral lands in character and only fit for agricultural and grazing purposes and not known to be coal lands or possessing any value whatever by reason of any coal deposits known to be contained in them.

[fol. 204] 3. Admit that Utah was admitted into the Union by an Act of Congress entitled, "An act to enable the people of Utah to form a constitution and state government and to be admitted into the Union on an equal footing with the original states" approved July 16th, 1894, and that by said Act the state of Utah was granted by complainant upwards of one million acres of land for the establishment and maintenance of state schools, asylums, institutions and other state purposes which lands were to be selected by the state under the direct of the secretary of the interior from

the unappropriated non-mineral and non-coal lands of the complainant, and were to be disposed of exclusively for the purposes named in said act in such manner as the legislature of the state should provide, but deny that no mineral lands were granted to said state of Utah by said act of Congress except saline lands, and admit that in the year 1896 the legislature of the state of Utah created a Board of Land Commissioners which was given direction, management and control of the lands granted to the state by complainant and that said Board was empowered to sell the same in accordance with the provisions of said act and the constitution of the state, and that said Board was authorized to cause all the public lands granted to the state to be selected and registered and that after the Board had so selected and numbered the same it became its duty to take such action as necessary to secure the approval of the complainant and final transfer of said selected lands from said complainant to said state, and these defendants deny that the only lands which the State of Utah was authorized to select and obtain title to from said complainant were surveyed, unappropriated, unreserved non-mineral lands, (except saline lands which were expressly granted to said State of Utah), and admit that no officer of said complainant had authority to transfer the title of complainant to said state of Utah to any public lands that had been appropriated, or reserved, and these defendants, saving as herein appears, say that it is not a fact that no officer of the complainant had authority to transfer the title of the complainant to said State of any unappropriated and unreserved public lands which were mineral lands, or coal lands, or lands classified as mineral lands.

4. These defendants deny that the only way by which said lands described in paragraph 2 of complainant's second amended bill of complaint could be legally procured from complainant, was through a compliance with an act entitled, "an act to provide for the sale of lands of the United States containing coal," which said act was ap- [fol. 205] proved March 3rd, 1873, and is in part as set forth in paragraph 4 of said complainant's complaint.

5. Deny that during the lifetime of Stanley B. Milner, and on and prior to December 10, 1900, or at any other time or at all, the said Stanley B. Milner formed a plan or scheme

to obtain the title to lands set forth in paragraph 2 of said complainant's complaint without a compliance with the act of Congress relating to coal lands and without paying the price fixed by complainant for lands chiefly valuable for coal or with the fraudulent purpose or intent to obtain said coal lands as cheaply as possible or with the fraudulent intent or purpose of obtaining a larger acreage of coal lands than he could otherwise obtain under said coal land laws or that said scheme was formed and entered into with the fraudulent intent or purpose of defrauding the United State of America out of the title of and possession or use of the aforesaid lands or any part or portion thereof, or that said or any plan or scheme so or at all formed by the said Stanley B. Milner was to be carried out in the matter set forth in complainant's complaint, to wit: To induce the officers of the State of Utah, to wit: the officers of the State Board of Land Commissioners or any of them to select said lands as grazing lands or agricultural lands or to induce or obtain the said officers of said State Board of Land Commissioners of the State of Utah, or any of them, to represent to complainant that the said lands, or any of them, were grazing lands and chiefly valuable for grazing and agricultural purposes, and not valuable as mineral lands, or in any way or manner to induce said officers of said Board of Land Commissioners or any of them to select said lands under the aforesaid grant of lands made to the said State of Utah in said Enabling Act admitting Utah into the Union to have said lands listed or certified to the State of Utah as non-mineral lands or to induce the said officers of said State Board of Land Commissioners, or any of them to sell said lands or any of them to the said Stanley B. Milner or to other persons or any person or persons selected by him to purchase said lands or any of them for and in his behalf at a cheap price or on long time payments.

6. Deny that in pursuance of said or any fraudulent scheme or plan formed by said Stanley B. Milner to obtain said lands described in paragraph 2 of complainant's second amended bill of complaint as mineral lands, the said Stanley B. Milner during his lifetime or on or about December 10th, 1900 or at any other time filed an affidavit and application [fol. 206] with said Board of Land Commissioners of the State of Utah to purchase that portion of said described land described in paragraph 6 of complainant's second amended

bill of complaint or any of the same, but these defendants admit that the said Stanley B. Milner on or about December 10th, 1900, did make an application for the purchase of said lands described in paragraph 6 of complainant's second amended bill of complaint and that he was required by said State Board of Land Commissioners of the State of Utah to enter into and that he did enter into a preliminary agreement for the purchase of said lands which contained among other things the express provision that if said land was hereafter determined to be mineral in character, or if any person other than the said state shall be determined to have a superior right or claim to said land, then in either of said events, said state of Utah shall be released from all obligations under said contract and that it was further stated in said agreement that said lands were grazing lands and said agreement was in the form of an affidavit and was subscribed and sworn to by the said Stanley B. Milner, and that attached to said agreement and made a part thereof was the affidavit set forth in paragraph 6 of complainant's second amended bill of complaint and that said affidavit was subscribed and sworn to by the said Stanley B. Milner as a part of his application to purchase said land. These defendants deny that the said Stanley B. Milner made said application for the purchase of said lands or entered into said agreement or made said application or affidavit for the purpose of fraudulently acquiring the title to said lands, or for the purpose of procuring the title to said lands or any of them in any other or different way from that provided under the laws of the United States or the enabling act or the constitution or the laws of the United States for the acquisition of title to public lands of the character of the land sought to be purchased, and these defendants deny that at the time of the making of said agreement or application to purchase or affidavit by the said Stanley B. Milner that he well or at all knew that said lands or any portion thereof, were chiefly or at all valuable for the coal deposits therein, but on the contrary these defendants state that at said time the said Stanley B. Milner was informed and knew that said lands and all of them had no value whatever for any coal deposits contained therein and that none of said lands were known to contain any coal deposits and that the only value which said lands or any of them had was for agricultural and grazing purposes and said lands were of the

[fol. 207] character uniformly theretofore held by the Commissioner of complainant's general land office to be non-mineral, non-coal and agricultural lands, and not subject to entry in any other or different manner than that provided by complainant's Commissioner of the General Land Office for the entry of non-mineral and non-coal lands, and these defendants deny that said agreement or application or affidavit or either of them were false, or fraudulent, as alleged in complainant's second amended bill of complaint or in any other matter or thing whatsoever, or that the same or any of them were fraudulently made for the purpose of obtaining title to coal lands or not for the purpose of securing said lands for agricultural or grazing purposes.

7. These defendants admit that on or about April 1st, 1901, the said Stanley B. Milner, as the agent of his wife, Truth A. Milner, filed a similar application, agreement and affidavit with the State Board of Land Commissioners to purchase the premises set forth in paragraph 7 of complainant's second amended bill of complaint, but deny that the filing of said application or agreement or affidavit or either of the same was done with any fraudulent purpose or intent as described in paragraph 7 of complainant's second amended bill of complaint or at all, but admit that said application, agreement and affidavit was in the same form as the one mentioned in said complainant's second amended bill of complaint as having been made by the said Stanley B. Milner for himself, and that such application, agreement and affidavit was subscribed and sworn to by the said Stanley B. Milner as the agent of his wife, Truth A. Milner; but deny that said affidavit or any affidavit filed by the said Stanley B. Milner as the agent of his wife Truth A. Milner was false or fraudulent in the particulars set forth in complainant's second amended bill of complaint or in any of the same, or that any such affidavit was made with the fraudulent purpose or intent of obtaining title to said or any coal lands, and deny that said affidavits were not made for the purpose of securing said lands and every part and portion thereof for agricultural purposes, and deny that said lands or any of the same were well or at all known coal lands, or chiefly or at all valuable for the coal deposits contained or known to be contained thereon, and on the contrary these defendants allege that at the time of the making of said affidavit and at all times men-

tioned in said complainant's second amended bill of complaint, said Stanley B. Milner was informed and knew that none of said lands were chiefly or at all valuable for [fol. 208] coal deposits contained or known to be contained therein, and he knew that none of said lands were known to contain coal deposits of any nature or description, and that the only value which said lands or any of them had was for agricultural and grazing purposes and knew that under the rulings, regulations and decisions of the Commissioner of complainant's general land office at Washington that lands of the character so applied to be purchased by him were classed as non-mineral, non-coal, but agricultural lands, and not subject to entry as coal lands.

8. These defendants admit that on or about March 29, 1902, the said Stanley B. Milner, as agent for his said wife Truth A. Milner, filed a like application and agreement and affidavit for the purchase of that portion of said lands described in paragraph 8 of complainant's second amended bill of complaint, but deny that said application, agreement or affidavit or either of them were false or fraudulent in the particulars set forth in complainant's second amended bill of complaint or any of them, or that said application or agreement or affidavit or any of them were made with the fraudulent purpose or intent of obtaining title to coal lands or were not made with the object of securing said lands for agricultural or grazing purposes, and deny that said lands or any of them were or are chiefly or at all valuable for the coal deposits contained or known to be contained therein or in any of the same, or that said lands or any of the same were at said time or at any other time or at all known to be coal lands but on the contrary these defendants state that all of said lands described in paragraph 8 of complainant's second amended bill of complaint were on the 28th day of March, 1902, and at all times mentioned in said complaint have been surveyed, vacant, unreserved and unappropriated non-mineral lands and non-coal lands of the United States and not known to contain any coal deposits of any nature or description and at the time of making said application, agreement and affidavit the said Stanley B. Milner was informed and knew that none of said lands were chiefly or at all valuable for coal deposits contained or

known to be contained therein, and he knew that none of said lands were known to contain coal deposits of any nature or description and that the only value which said lands or any of them had was for agricultural and grazing purposes, and knew that under the rulings, regulations and decisions of the Commissioner of complainant's general land office at Washington that land of the character so applied to be purchased by him as the agent of his said [fol. 209] wife were classed as non-mineral, non-coal but agricultural lands, and not subject to entry as coal lands.

9. These defendants admit that the said Stanley B. Milner on or about the 17th day of March, 1903 made an application agreement and affidavit as set forth in paragraph 9 of complainant's second amended bill of complaint as the agent of Harley O. Milner, of Milner, Idaho, to purchase the lands described in paragraph 9 of complainant's second amended bill of complaint, and that said application, agreement, and affidavit were in form as alleged in paragraph 9 of said complaint, but deny that said application, or agreement, or affidavit or either of them were false or fraudulent in the particulars set forth in said complaint or any of the same, or was made with the fraudulent purpose or intent to obtain title to coal lands or not with the object of securing said lands for agricultural or grazing purposes, and admit that said lands were purchased for the use and benefit of the said Stanley B. Milner and that he furnished the money to purchase said lands from the State of Utah with the understanding and agreement with the said Harley O. Milner that when the title thereto should be obtained from the State of Utah, or at such other time as demand was made therefor by said Stanley B. Milner, that the said land should be transferred to the said Stanley B. Milner, but deny that there was any understanding or agreement between him and the said Harley O. Milner that when the title to said land should be obtained from the State of Utah that said land should be transferred to some or any corporation, the capital stock of which was or might be owned by the said Stanley B. Milner.

10. Defendants deny that on or about the 15th day of September 1903 or at any other time or at all said Stanley B. Milner in pursuance of said or any scheme or plan to defraud the United States persuaded or induced said Sam-

uel H. Gilson to file an application, or affidavit or agreement to purchase from said state of Utah the lands described in paragraph 10 of complainant's second amended bill of complaint or any part or portion thereof, but defendants admit that the said Samuel H. Gilson did on or about the 14th day of September 1903 file an application, affidavit and agreement with the State Board of Land Commissioners of the State of Utah to purchase from said state the lands described in paragraph 10 of said complaint, and that said application, affidavit and agreement was in the form described in said complaint, and the affidavit was subscribed and sworn to by the said Samuel H. Gilson before [fol. 210] a Notary public, but deny that said application or affidavit or agreement was made for the fraudulent purpose of obtaining title to coal lands or not with the object of procuring said lands and all of the same for agricultural purposes, and deny that said affidavit or agreement or either of the same were false or fraudulent in the particulars as alleged in said complaint or in any particulars whatsoever, or that the same or either thereof was known to be false or fraudulent by the said Samuel H. Gilson at the time said application was sworn to by him or at any other time or all.

11. Defendants deny that prior to the making of said or any agreement or affidavit or application to purchase said lands or any of them from the State of Utah through the said State Board of Land Commissioners, or at any other time or at all, the said Stanley B. Milner had employed expert geologists and engineers to make examinations of the lands described in plaintiff's second amended bill of complaint, but admit that he himself with the aid and assistance of said Samuel H. Gilson, who is a man of large experience in the selection of coal lands and agricultural lands had prior to the time of making said or any applications for the purchase of any of the lands described in said complaint by any of these defendants or the said Harley O. Milner, or of the making of any affidavits or agreements by any of said parties and thoroughly examined each legal subdivision of the lands described in said complaint, but deny that the said Stanley B. Milner or the said Samuel H. Gilson had discovered that said lands or any of them were underlaid with vast or any deposits of

valuable or other coal, or that all or any of said lands were chiefly or at all valuable for the coal deposits contained therein or were of little or no value for any other purpose, or that so knowing or at all the said Stanley B. Milner determined or planned to obtain the title or possession of said coal lands or any of the same with the aid or assistance of the said Truth A. Milner, or Harley O. Milner, or Samuel H. Gilson with the purpose or intent of cheating or defrauding the United States, or that in pursuance of said or any fraudulent intent or purpose to defraud the United States out of the title or possession of said lands or any part or portion thereof, the said Stanley B. Milner or the said Samuel H. Gilson made the affidavits referred to in said complaint or any of them, well or at all knowing at said or any other time that the same or any of them were false or fraudulent in that said lands or any portion thereof did contain large or any deposits of coal or that [fol. 211] said lands were essentially or at all mineral lands, or that said lands were not essentially not non-mineral lands as stated in said affidavits or at all, and deny that said application to purchase said lands by the said Samuel H. Gilson was made for the use or benefit of the said Stanley B. Milner or not for the use of said Samuel H. Gilson, and save as hereinafter stated, these defendants deny that the money to purchase said lands was furnished by the said Stanley B. Milner, and not by the said Samuel H. Gilson and deny that both or either of the said Stanley B. Milner or the said Samuel H. Gilson well or at all knew at the time that all of said lands were applied for to the State of Utah or at any other time or at all that the same or any of them were well or at all known coal lands or chiefly or at all valuable for the deposits of coal contained therein, or that the same were not either grazing or agricultural lands, but on the contrary these defendants state that all of said lands described in paragraph 10 of complainant's second amended bill of complaint were on the 14th day of September 1903 and at all times mentioned in said complaint prior thereto had been surveyed, vacant, unreserved and unappropriated non-mineral and non-coal lands of the United States and not known to contain any coal deposits of any nature or description and at the time

of making said application, agreement and affidavit by the said Samuel H. Gilson, he was informed and knew that none of said lands were chiefly or at all valuable for coal deposits contained or known to be contained therein and he knew that none of said lands were known to contain coal deposits of any nature or description, and that the only value which said lands or any of them had was for agricultural and grazing purposes and knew that under the rulings, regulations and decisions of the Commissioner of complainant's general land office at Washington that lands of the character so applied to be purchased by him were classed as non-mineral, non-coal and agricultural lands and not subject to entry as non-coal lands.

12. These defendants save as hereinafter alleged, deny that the said State Board of Land Commissioners did not in fact make such examination or any investigation as to the character of said lands to determine whether the same were mineral or coal lands or non-mineral or non-coal lands, or as to whether said lands were agricultural or grazing lands, and did not do this either as a body or one or more of its members or officers or agents or agent or by means of any person or persons employed or procured by it as [fol. 212] agents for such purpose, or that on the contrary or at all said State Board of Land Commissioners acted solely on the representations of the said Stanley B. Milner and said Samuel H. Gilson to procure said lands for it, or that said representations in said cases alleged in said complaint and concerned in this suit were interested or biased or false or fraudulent in the essential or any particulars or that the said Stanley B. Milner or Truth A. Milner or Harley O. Milner or Samuel H. Gilson did not seek to obtain said lands for either grazing or agricultural purposes as they represented, or that they did seek to obtain said lands for coal lands or in that said persons or any of them represented that said lands were not mineral or coal lands when in fact said lands were mineral or coal lands or were sought to be obtained by said defendants or any of them for the certainty that they or any of them were coal lands and deny that as a result of said or any false or fraudulent representations of said defendants or either of them making said affidavits said State Board of Land Commissioners were induced to or did enter into contracts in writing with

said applicants or either of them whereby said State Board of Land Commissioners would select the lands applied for by any of them, but admit that said Board of Land Commissioners entered into a preliminary contract with said defendants whereby the said State Board of Land Commissioners agreed to select the lands applied for and that when said state should have obtained patent to the same that it would sell them to said applicants at private sale for the sum of $1.50 per acre or thereabouts and these defendants admit that said State Board of Land Commissioners appointed its president and secretary as its agents to attend to the details of its said business, and to investigate the lands involved in said or any applications to purchase as well as to obtain certain certified selections from complainant of lands provided for by the grant mentioned in said complaint and admit that the said president and secretary did in the performance and supposed performance of their duties appoint and delegate the applicants, defendants herein as aforesaid, as agents and representatives of said Board to determine, investigate and ascertain as to the character of said lands, but deny that said appointment by the said president and secretary of said Land Board of the said defendants or any of them to investigate, examine and ascertain the character of said lands was by reason of any false or fraudulent representations made to them by said defendants or either of them as alleged in paragraph 12 of complainant's second amended bill of complaint, and [fol. 213] these defendants admit that the said Stanley B. Milner and Samuel H. Gilson duly reported that they had investigated and found the lands applied for by each of them respectively to be non-mineral and non-coal and chiefly valuable for agricultural purposes. These defendants deny that at the time that said several applications or any of them were made it was a known or any rule of complainant's general land office that no Register or Receiver of any land office in the mineral states would accept an entry of non-mineral land unless accompanied by a non-mineral affidavit based upon the personal knowledge of the entryman, or that such rule applied in full or with any force to selections when made by the State of Utah under the grant to it by said act of Congress, and deny that notwithstanding said known rule said State Board of Land Commis-

sioners of the State of Utah by its president and secretary as selecting agents did not comply with the same as appears from the several affidavits affecting the several lists in which the aforesaid lands are included as alleged in complainant's second amended bill of complaint, or in any other manner or at all save as hereinafter averred, and these defendants deny that the only affidavits furnished by said State Board of Land Commissioners to the Register and Receiver accompanying said lists respectively was one in each case, but admit that said State Board of Land Commissioners did furnish to said Register and Receiver accompanying said lists respectively and affidavit in effect and practically the same in all cases in substance as set forth in paragraph 12 of complainant's second amended bill of complaint, except that each of said affidavits contained a description by legal subdivisions of the land sought to be purchased. And admit that each of said affidavits were subscribed by the president and secretary as agents for said State Board of Land Commissioners and sworn to by them before a notary public, and admit that the Register and Receiver of complainant's Land Office at Salt Lake City, within whose district the lands herein concerned are situated received from said State Board of Land Commissioners the list containing descriptions of lands involved herein and forwarded the same as was their duty to the commissioner of complainant's general land office, but deny that the officials or employes or either of them were duly or at all impressed by the fact that the State of Utah was applicant for such lands or that they had no knowledge or suspicion that said president or secretary acting as agents of said State Board had contracted to sell said lands in advance, or that they did not know that no employe or agent of the [fol. 214] State of Utah had investigated or examined said lands, or that such examination, if any was made, had been entrusted to the defendants who had made the respective applications to purchase, but deny that said defendants or any of them were persons who had been procured to defraud complainant of its lands, or that said lands had been examined by any persons or application, agreements or affidavits made in connection with applications for the purchase of said lands by any person or persons who had been procured to defraud complainant of said lands in the interest of said defendants or any of them, and deny that

whatever action said persons making said examination did take was for the purpose of defrauding or falsely representing to said State Board the character or conditions of said lands to enable said State Board to have some or any foundation upon which to base their direct or positive or unequivocal assertions on oath, and these defendants deny that the officers or employees of said general land office by reason of the fact that the State of Utah being so or at all impressive in its functions as applicant for portions of the lands granted by Congress for beneficial purposes to said State were led to or did believe in the regularity or honesty or good faith of said state or to overlook the fact that upon the face of each and every one of said printed sworn statements it was made certain that affiants had no personal knowledge of that which they positively asserted, or no knowledge which gave force to that asserted in negative form, but on the contrary these defendants state that the officers and employees of the general land office knew and were informed upon receiving each selection list of the said State Land Board and before taking affirmative action thereon that the affidavits accompanying the same were in form and substance as set forth in paragraph 6 of complainant's second amended bill of complaint, and deny that said selection lists or affidavits accompanying the same or the showing made thereby for the certification had no legal force or efficacy whatever or that the same contained nothing upon which the mind of the commissioner of complainant's general land office could act or his judgment be founded in attempting to determine whether in fact said lands were mineral or non-mineral, coal or non-coal, but these defendants allege that the said State Board of Land Commissioners of the State of Utah furnished to the commissioner of complainant's general land office all of the proof and evidence required by said commissioner or called for by him or by the rules enforced by him and said general [fol. 215] land office upon the filing of selection lists by the said State Board of Land Commissioners of the State of Utah, and the said Commissioner of the general land office received said selection lists and the affidavits accompanying the same made by the president and secretary of said State Land Board and with full knowledge of the contents of said affidavits and selection lists undertook to and did adjudicate the character of the lands described in said re-

spective selection lists, and that prior to the considering and adjudicating the character of the lands described in the selection lists involved in this action, the commissioner of said land office had at all times accepted selection lists from the said State Board of Land Commissioners when accompanied by affidavits in form and substance the same as those accompanying the selection lists of these defendants and without any other or further proof had invariably allowed and approved said lists, and said rule and practice was the established and existing rule and practice at all times mentioned in complainant's second amended bill of complaint, and these defendants deny that the actions of said Commissioner or any of the same taken by him in certifying said lands or in approving and allowing said lists was without jurisdiction or wholly or at all void or did not avail to pass from complainant to the State of Utah the lands herein concerned.

13. These defendants deny that said or any of the officers or agents of the said State Board of Land Commissioners being deceived as alleged in complainant's second amended bill of complaint by the false affidavits of said applicants or any of them or not having thorough or any information as to the character of said lands and all of them or relying entirely or at all upon the statements made in said affidavits of said applicants or any of them or upon any of such statements or not knowing the same to be false or fraudulent did make a non-mineral affidavit, and the affidavit that said lands did not contain deposits of coal as set out in complainant's second amended bill of complaint or did file said affidavit attached to the lists of land selected by the State of Utah or any of them or did file said affidavits as aforesaid with the said Register and Receiver of the land office at Salt Lake City, Utah, and deny that the Register and Receiver of complainant's land office at Salt Lake City, or each or either were deceived by the aforesaid affidavits or either of the same so made by said agents of said State Board of Land Commissioners or any of them as [fol. 216] alleged in said complaint or that having no evidence as to the character of said lands or any of them did rely entirely or at all upon the affidavits aforesaid or any of them so made by the agents of said State Board of Land Commissioners of the State of Utah, but admit that the said

Register and Receiver did certify to the Commissioner of the general land office that certain of the legal subdivisions applied for as hereinafter stated are not nor is any part or portion thereof returned and denominated as mineral lands, and admit that they did allow and approve said lists of land made by said State of Utah, but deny that such allowance and approval was made solely on account of the evidence contained in the affidavit of said president and secretary of said State Board of Land Commissioners of the State of Utah as agents therefor, and admit that the said Register and Receiver did forward said affidavits with lists of said lands together with their certificate of allowance and approval but deny that said allowance and approval was based upon any false evidence alleged in complainant's second amended bill of complaint, or upon any false evidence, to the Commissioner of said complainant's general land office at Washington and deny that said Commissioner in passing upon the character of said lands mentioned in said lists or any of them did rely solely or entirely upon the statements made in said affidavits or any of them so made by the said president and secretary of said State Land Board that said lands were essentially non-mineral in character and contained no deposits of coal, together with the certificate of the Register and Receiver of said land office which was attached to said lists approving the same or that said Commissioner had no other knowledge of the character of said lands, or that said Commissioner was thereby or at all deceived as to the character of said lands, or that not knowing that said lands were coal lands, certified all of said lands described in complainant's second amended bill of complaint to the State of Utah as being lands of the character contemplated in said grant, and deny that in fact or at all said lands were not of the character contemplated by said grant, but admit that had it been known by said Register and Receiver of the land office at Salt Lake City, Utah, or by said Commissioner of complainant's general land office that said lands were coal lands and chiefly valuable for the deposits of coal contained therein, said lists would not have been allowed and approved nor certified by said Commissioner of complainant's land office to the State of Utah. These de-
[fol. 217] fendants deny that the evidence alleged by said complainant in its second amended bill of complaint as being all of the evidence that was before the Register and Re-

ceiver of the land office at Salt Lake City, Utah, and all of the evidence that was before the Commissioner of the general land office at Washington as to the character of the lands so listed and certified to said State of Utah and described in its second amended bill of complaint was all of the evidence before said Register and Receiver of said local land office or before said Commissioner as to the character of said land, but these defendants are informed and believe and therefore allege the fact to be that said complainant had caused its duly authorized officers and agents to make an examination and inspection of said lands and all of the same with the object in view of determining the character of said lands and each legal subdivision thereof as to whether the same were mineral or non-mineral, coal or non-coal, or agricultural and that the said officers and agents of said complainant in the performance of their respective duties and prior to the adjudication of the commissioner of complainant's general land office as to the character of said lands and of each legal subdivision thereof had duly made report to said general land office of the character of each legal subdivision of said land and in said report had classified all of the lands described in paragraphs 6, 7, 8, and 9 of complainant's second amended bill of complaint as non-mineral, non-coal and agricultural lands, and had classified all the lands described in paragraph 10 of complainant's second amended bill of complaint as coal lands, and the said Commissioner at the time of adjudicating the character of the lands described in each respective selection list was fully informed as to the classification of said lands so made by a duly authorized agent of said general land office delegated, instructed and empowered to classify said lands and all of the same, and prior to the filing of said selection lists and each of the same with the said Register and Receiver of the local land office at Salt Lake City, the Commissioner of the General land office had caused to be made plats showing among other lands the lands described in each of said selection lists and caused to be noted upon said plats the character of each legal subdivision of said lands so described in said selection lists, classifying such lands as to its being mineral or non-mineral, coal or non-coal or agricultural lands according to the classification which had been made and prepared by the agent of said land department so delegated and authorized to make such classification as herein-

[fol. 218] above set forth, and said plats with the notations as to the character of said lands had been transmitted by the Commissioner of the general land office to the Register and Receiver of the local land office at Salt Lake City, Utah, prior to the time when said selection lists had been filed by the State Board of Land Commissioners of the State of Utah with the said Register and Receiver of the local land office and said Register and Receiver at the time when each of said lists were filed with them by said Board of Land Commissioners were fully informed as to the classification which had been made and recognized by the general land office of complainant and said plats and the notations thereon as to the character of said public lands under the rules and regulations of the general land office were taken by said Register and Receiver of the local land office as prima facie the character of each respective legal subdivision of said lands, and at all times herein mentioned it was the rule and regulation of said land department to call upon any applicant for the purchase of public lands when the proof of the character of lands sought to be purchased by such applicant was not satisfactory or sufficient in the judgment of the Commissioner of complainant's general land office to enable him to determine the character of any legal subdivision sought to be purchased to furnish further proof or evidence by way of affidavit or otherwise that might be required or called for by the Commissioner of complainant's general land office.

14. These defendants admit that the Congress of the United States passed an act which was approved August 3rd, 1854, R. S. Section 2449, which ever since has been and is now in force, providing as set forth in paragraph 14 of complainant's second amended bill of complaint, but defendants deny that in obedience to said law it became or was the duty of the then Commissioner for the want of proof that the lands named and described in said lists of selection or any of them were of the character contemplated by said act of congress to withhold its certificate or return them to the local land office of complainant and deny that either through inadvertence or mistake or by reason of clear or other error of law or deception as to the character of said lands or any of them said Commissioner did approve said lists or any of them but admit that said commissioner did approve said lists and all of the same under his hand and seal and did endorse his certificate thereon, and these de-

fendants allege that upon receipt of them each of said selection lists it became and was the duty of the commissioner [fol. 219] to consider such proofs as had been submitted by the applicant to purchase of the character of the lands described in such lists, and to call for additional or further proof upon the question of the character of such lands if the proof already furnished was not in the opinion of said Commissioner sufficient to enable him to adjudicate and decide the character of each particular legal subdivision of land applied for, and from the proofs furnished and called for by such Commissioner it became and was his duty to adjudicate, determine and decide the character of the lands described in each respective list, and in determining, adjudicating and deciding the character of such lands said Commissioner had the right authority, and it was within his province to acquire information from any source deemed advisable to him, including the classification made by the authorized agent of the General land office as hereinabove recited.

15. These defendants deny that neither in equity or good conscience nor in law were the said lists of land or any of the same although certified as alleged in complainant's second amended bill of complaint available to convey any right, title, claim or interest from complainant to the State of Utah to any of the lands concerned in this action because the State of Utah while not as a government or collective body so intended was by or through the failure of certain or any of the officers or agents to safeguard its interests as described in complainant's second amended bill of complaint made to appear as an active or any party to a gross or any fraud upon complainant in a matter in which the complainant had been bestowing a gift or grant to said state, or had been made the most potential or any factor in such or any fraud, though in small or any sense a beneficiary thereof, or because the Commissioner of complainant's general land office acquired no jurisdiction to act upon state's application to have said lists so certified by reason of the terms of the act of Congress as set forth in said complaint or because the officials of said complainant, the said Register or Receiver of the local land office or the commissioner of the general land office were each or either deceived by the false or any affidavits described in said complaint or at all.

16. These defendants admit that the application for the land first applied for by said Stanley B. Milner on December 10, 1900, as above described were approved by the State of Utah on December 17, 1900, and said land was selected by said state and said selection was approved by the United States Land Office for the District of Utah on [fol. 220] December 18, 1900, and certified to the State of Utah by the general land office on June 22, 1901, and that the price agreed to be paid by the said Stanley B. Milner to the State of Utah was $1.50 per acre of a total consideration of $880.00 payable in ten annual payments, and admit that the defendant Peter N. Campbell of Springfield, Massachusetts has and claims to have a mortgage lien on said land and all of the same for the sum of $25,000.00 on account of a mortgage given by the said Carbon County Land Company on or about February 26, 1904, and admit that the land applied for by Truth A. Milner by Stanley B. Milner her agent in application dated April 19, 1901 above described was approved by the State of Utah April 22, 1901, and selected by said state and said selection was approved by the United States Land Office at Salt Lake City, Utah, April 29, 1901, and certified to the State of Utah by the general land office December 23, 1901, and that the price agreed to be paid by the said Truth A. Milner to the State therefor was the sum of $1.50 per acre or a total consideration of $480.00 to be paid in ten annual payments, and admit that the second application for the land applied for by Truth A. Milner to her agent Stanley B. Milner as set forth in complainant's second amended bill of complaint was approved by the State of Utah April 2, 1902, and that said land was selected by said state and that said selection was approved by the United States Land Office at Salt Lake City, Utah, April 7, 1902, and certified to the State of Utah by the general land office July 9, 1903, and that the price agreed to be paid by said Truth A. Milner to the State therefor was $1.50 per acre to be paid in ten annual payments, and admit that the land applied for by Harley O. Milner by his agent Stanley B. Milner above described was approved by the State of Utah March 24, 1903, and said land was selected by said state and said selection was approved by the United States land office at Salt Lake City, Utah, March 30th, 1903, and certified to the State of Utah by the general land office May 9, 1904, and that the price

agreed to be paid by Harley O. Milner to the state therefor was $1.50 per acre or a total consideration of $3366.36 to be paid in ten annual payments and admit that the application for the land applied for by Samuel H. Gilson as set forth in said complaint was approved by the State of Utah December 15, 1903, and the said land was selected by the State of Utah and said selection was approved by the United States Land Office at Salt Lake City, Utah, September 17, 1903, and certified to the State of Utah by the general land office December 1, 1904, and that the price agreed [fol. 221] to be paid by said Samuel H. Gilson to the state therefore was $1.50 per acre or a total consideration of $904.50 to be paid in ten annual payments; admit that the State Board of Land Commissioners of the State of Utah entered into contracts to sell to each of said defendants and to said Harley O. Milner respectively the respectively described lands incorporated in the respective lists prepared for lands granted to the State of Utah by said act of Congress of July 16, 1894, and that thereafter the said commissioner of complainant's general land office approved said lists submitted by the State of Utah containing the above descriptions and thereafter certified said lands with others to the State of Utah.

17. And these defendants admit that no patents from the State of Utah to said defendants have ever been issued for any of said lands and that all payments as required under said contracts have been made as therein provided. And admit that said Stanley B. Milner died at Salt Lake City, Utah, on or about the 2nd day of May, 1906, and left a last will and testament and that by said last will and testament he devised and bequeathed all his property, both real and personal, to his wife Truth A. Milner and by said last will and testament he made her sole executrix and said will has been admitted to probate in the district court of Salt Lake County, State of Utah, and said Truth A. Milner has duly qualified and is now acting as sole executrix of said estate.

18. These defendants admit that during his life time the said Stanley B. Milner caused to be organized under the laws of the State of Utah a corporation known as and called the Carbon County Land Company and that said corporation was duly organized under the laws of said state but deny that said corporation was organized as a part of

the scheme by said Stanley B. Milner or any of the defendants to fraudulently obtain the lands described in complainant's second amended bill of complaint or any of them, and deny that all of the stock of said corporation or any of the same was owned by Stanley B. Milner at the time of his death or that he ever owned all of the stock of said corporation except an insignificant number of shares or that he ever gave any of the shares of said corporation to persons solely for the purpose of enabling said corporation to be formed with any intent or as a part of any scheme to fraudulently obtain said lands or any part or portion thereof, and deny that as a part of any scheme to defraud complainant as set forth in complainant's second amended bill of complaint or in any other manner or at all said agreements [fol. 222] to purchase said lands from the State of Utah or any of them have been assigned or transferred to said Carbon County Land Company, but these defendants admit that for the reasons and purposes hereinafter set forth each and every of said agreements to purchase said lands have been heretofore assigned and transferred to said Carbon County Land Company and said corporation at the time of the bringing of this action and at all times since and now is the owner of each and every one of said contracts and all rights accrued or hereafter to accrue thereunder, and admit that all the payments that have been made by the said Milners and the said Gilson on the said contracts were all made with the moneys furnished by the said Stanley B. Milner during his life time or by some one acting by him and in his behalf but that the moneys so furnished by the said Stanley B. Milner were for the purposes and the considerations hereinafter set forth, and deny that since his death his estate has furnished any moneys with which to make any payments upon said contracts, and deny that the sole or any purpose or intent of the said defendants or either of them in making said applications to purchase said lands or any of them or in making said agreements was to acquire the title or possession of said lands in the interest of or for the benefit of said Stanley B. Milner save as hereinafter stated, and deny that in pursuance of said understanding and agreement or of any understanding or agreement save as hereinafter stated said assignments or transfers of said contracts have been made to said Carbon County Land Company, and deny that all or any of the stock of said

company is owned by the said Truth A. Milner as sole or other legatee of the last will and testament of said Stanley B. Milner deceased, but on the contrary these defendants state the fact to be that the said Truth A. Milner is and has been since prior to the death of Stanley B. Milner, deceased, the sole owner in her own right of 84940 shares of the capital stock of said Carbon County Land Company, and the balance of said stock is owned by divers other persons in their own right and not held by such persons or any of them for the purpose of qualifying them as officers or directors of said company.

19. These defendants admit that Peter N. Campbell is a citizen of the State of Massachusetts and resides at Springfield in said state and that he has and claims to have a lien on a portion of the aforesaid lands by reason of mortgage made and executed to him by the said Carbon County Land [fol. 223] Company, and admit that this is an action wherein the complainant claims the legal and equitable title to all of the lands described in complainant's second amended bill of complaint.

20. These defendants state that the Carbon County Land Company was organized under the laws of the State of Utah on or about the 10th day of March, 1903, with a capital stock of ten thousand dollars divided into one hundred thousand shares of the par value of ten cents each of which amount Harrison E. Jenkins, Hiram E. Booth, B. D. Newman, A. C. Sadler and Edward E. Jenkins each subscribed for ten shares in the articles of incorporation and the balance of said stock was subscribed for by Harrison E. Jenkins, Trustee for the uses and purposes hereinafter set forth.

21. The defendants allege that all payments made upon said contracts for the sale of lands by the State of Utah to each of these defendants and the said Harley O. Milner since the assignment thereof to the Carbon County Land Company as hereinafter stated have been made by the said Carbon County Land Company.

22. That at all times herein mentioned, it was the custom and rule of said Board of Land Commissioners of the State of Utah to receive applications from parties for the purchase of public lands within said state, and this even be-

fore any selections had been made of such lands by the State of Utah, and that upon the making of said application by a prospective purchaser, the said Board of Land Commissioners would make a selection of said lands and file a list of such selections with the Register and Receiver of the Land Office at Salt Lake City, Utah, to be acted upon by said Register and Receiver of said local land office and complainant's general land office at Washington, D. C., and the commissioner thereof, in the manner provided by law and the rules and regulations of said land office and complainant's Department of the Interior, which said custom and rule was at all times herein mentioned, well known to the Register and Receiver of the land office at Salt Lake City, and to the Commissioner of complainant's general land office at Washington, D. C., and to all of the officers of said general land office, and that at all times herein mentioned up to and until the 3rd day of October, 1903, it was the custom and rule of the State Board of Land Commissioners of the State of Utah, upon the application of any party to purchase lands from the State of Utah, to require a showing to be made by way of affidavit of the applicant or otherwise in the form and substance of the affidavit set forth in paragraph 6 of complainant's second amended [fol. 224] bill of complaint, except that the affidavit would describe the land for which application was made to purchase according to its legal subdivisions, showing among other things that the affiant was well acquainted with the character of the land sought to be purchased and of each and every legal subdivision thereof, and that he had passed over the same and that his personal knowledge of the land was such as to enable him to testify understandingly with regard thereto, and that there was not to his knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal, and that no portion of the land sought to be purchased was claimed for mining purposes, or worked during any part of the year by any person or persons, and that said land is essentially non-mineral land and that upon the making of such showing the said State Board of Land Commissioners would make a selection of said lands and file its list of such selections with the Receiver and Register of the land office at Salt Lake City, Utah, to receive their action, and the action of the

Commissioner of complainant's general land office at Washington, D. C., and of the officers of said office, and during all of said period of time it was the further custom of the President and Secretary of said State Board of Land Commissioners who had been appointed by said Board as its agents to attend to the details of its business, to obtain certified selections of the land from complainant as provided for in the grant hereinabove mentioned, to accompany said lists with an affidavit of the President and Secretary of said Board in form and substance as set forth in paragraph 12 of complainant's second amended bill of complaint, and sworn to by the President and Secretary of said State Board of Land Commissioners as the agents of said Board before a notary public, and during all of the times herein mentioned the rules, regulations, customs and requirements of the said Board of Land Commissioners of the State of Utah as hereinabove recited were all well and thoroughly known to the Register and Receiver of complainant's local land office at Salt Lake City, Utah, and to the Commissioner of complainant's general land office at Washington, D. C., and the officers thereof, and all the acts of the said Register and Receiver of the office at Salt Lake City and of the Commissioner of complainant's general land office at Washington, D. C., and all of the officers of said land office as related in complainant's complaint and in this answer thereto were done and performed with full and complete notice and knowledge of all the rules, regulations, customs, and requirements of said State Board of Land [fol. 225] Commissioners of the State of Utah as herein related; that at all times herein mentioned it was the custom and rule of the Register and Receiver of the land office at Salt Lake City, Utah, to accept all entries for non-mineral lands upon the filing of said selection by the said State Board of Land Commissioners of the State of Utah, accompanied by said affidavit so made by the said President and Secretary of said State Board of Land Commissioners, and it was the duty of said Register and Receiver of said local land office, upon the receipt of such selection, list or lists and affidavits, when the land so described in said selection lists did not appear upon the plats of the local land office as mineral or coal lands to forward the same to the Commissioner of complainant's general land office at Washington, or if the lands described in said selection list,

or any of the legal subdivisions thereof, appeared upon the plats in said local land office as mineral or coal lands, then it became the duty of said Register and Receiver to set down for hearing upon a day certain the question as to the character of the lands and of each legal subdivision thereof described in said list which were returned and classified upon the plats in said local land office as mineral or coal lands, and to cause notice of such hearing to be given to said State Board of Land Commissioners and to be published in a newspaper printed in the English language in the county where said lands were situated according to the rules and regulations of complainant's general land office, to which reference is hereby made, and upon the day set in said notice it was the duty of the Register and Receiver of said local land office to hear and record all evidence introduced by or on behalf of the State of Utah or parties offering evidence in protestation or object to the selection of said lands or any legal subdivision thereof by the state and forward the same with said selection list to the Commissioner of complainant's general land office, and thereupon it became the duty of said Commissioner upon receipt of said selection list, together with any affidavits or proof submitted by the State of Utah, to decide and determine the question of fact as to whether said lands so selected were agricultural, mineral or non-mineral, coal or non-coal, and if determined by him to be nonmineral and non-coal lands, to allow and approve said selection list and said decision and determination of said commissioner and his act of allowing and approving said selection list when made, constituted a judicial determination of the character of such lands, (unless reviewed by complainant's Secretary of the Interior), and conclusively settled and determined the character of the lands described in such lists.

[fol. 226] 23. That on or about the 10th day of December, 1900, the said defendant Stanley B. Milner filed an application with the State Board of Land Commissioners of the State of Utah in form and substance as required by the rules and regulations of said State Board of Land Commissioners to purchase the following described lands, to-wit: The northwest quarter and the southeast quarter of section 22; the east half of Section 27; the south half of Section

33, all of section 34, the south half of section 35, township 12 south, range 11 east, Salt Lake Meridian, and filed with said State Board of Land Commissioners at the time of making said application and as a part thereof an affidavit as set forth in paragraph 6 of complainant's second amended bill of complaint, and said affidavit was subscribed and sworn to by the said Stanley B. Milner as a part of his application to purchase the aforesaid lands; that said lands and every legal subdivision thereof appeared upon the maps and records of the local land office at Salt Lake City, Utah, as non-mineral and non-coal lands; that prior to the filing of said application and affidavit by the said Stanley B. Milner he had in connection with the defendant Samuel H. Gilson made a complete and thorough examination of said lands and each and every legal subdivision thereof for the purpose of determining and ascertaining as to whether the same were agricultural, mineral or non-mineral, coal or non-coal lands, and as to whether the same or any legal subdivisions thereof were more valuable for agricultural purposes than for the mineral or coal deposits which were contained therein, and the said defendants Stanley B. Milner and Samuel H. Gilson by said investigation ascertained and determined that there was not upon said premises or any legal subdivision thereof any disclosure or appearance or outcrop of any nature or description of coal or of mineral bearing rock carrying mineral of any nature or description and at the time of making said application and at all times since all of said premises and each and every legal subdivision thereof were agricultural and grazing lands and not mineral or coal lands, and had and have no value whatever for any deposits of coal contained or known to be contained therein, and the only value which said premises had or have was or is for agricultural and grazing purposes, there existing on said lands as good and substantial growth of vegetation and grass fit for grazing purposes, and these defendants further state that at the time of the making of said application to purchase said premises and at all times herein mentioned the said Stanley B. Milner and Samuel H. Gilson knew that it was the policy of complainant to withdraw from entry large and extensive areas of the public domain from [fol. 227] which to create timber reserves, and that said complainant had already withdrawn from entry for timber

reserve purposes vast areas of the public domain in close proximity to all of the lands described in complainant's second amended bill of complaint and that said complainant had, or intended to withdraw from entry in the State of Utah and in the adjoining states, other vast and extensive areas of the public domain to be used for timber reserve purposes, and during all of the times herein mentioned said defendants and each of them knew that all of said facts were known generally to the cattle and stock men and that they and speculators in land generally were acquiring from the complainant or from the State of Utah and surrounding states, large tracts of the unreserved public lands and that the cattle and stock ranges in the state and elsewhere were becoming very rapidly exhausted and circumscribed and that by reason thereof agricultural and grazing lands of all descriptions in the State of Utah were advancing and would continue to advance very rapidly in valuation, and it was by reason of these facts known to the said defendant Stanley B. Milner, and not otherwise, that he made said application on the 10th day of December, 1900, to purchase said lands last above described, but at the time of making said application the said Stanley B. Milner thought that possibly beneath the surface of some parts or portions of some of said legal subdivisions, (but of which it was impossible for said defendant to determine) and only at great depth, there might exist some coal deposits of uncertain and questionable quantity, quality and value, but said lands at said time did not, nor did they at any other time herein mentioned, have any value for any coal deposits known, believed or presumed to be contained therein, but on the contrary, all of said lands were desirable lands for agricultural and grazing purposes and worth $1.50 and unwards per acre.

24. That at all times herein mentioned it had been decided, ruled and held by the Commissioner of complainant's general land office at Washington, D. C., that none of the public domain or lands of the complainant were coal lands within the contemplation of the law, unless and except there be disclosed and appearing thereon a deposit or measure of coal of such proportions, quanity, quality and value as caused the land or some particular legal subdivision thereof to be chiefly valuable for coal known to exist thereon; that the said Stanley B. Milner at the time of making his application

to the said State Board of Land Commissioners of the State [fol. 228] of Utah to purchase said lands knew of and was fully informed as to the substance of the rulings and decisions which had been made theretofore by the Commissioner of Complainant's general land office at Washington, D. C., as herein recited, and he, the said Stanley B. Milner, at the time of making said application to purchase, knew and was well informed that said lands which he was applying to purchase were non-mineral and non-coal lands within the rulings and the decisions of the Commissioner of complainant's general land office at Washington, as herein recited, and that within said rulings and decisions said lands on the contrary were non-mineral, non-coal lands and open to selection by the State of Utah under said grant as agricultural lands and these defendants further state that the said State Board of Land Commissioners of the State of Utah upon receipt on the 10th day of December, 1900, of the application of the said Stanley B. Milner to purchase said lands accompanied by said affidavit above mentioned made and filed with the Receiver and Register of the land office at Salt Lake City, Utah, a selection list describing said lands accompanied by an affidavit in form and substance as set forth in paragraph 12 of complainant's second amended bill of complaint; that each and every statement contained in said application and in said affidavit was true; that the said Receiver and Register of said land office in performance of their duty forwarded said selection list and affidavit to the Commissioner of complainant's general land office at Washington, D. C., and said Commissioner thereupon, in the performance of his duties in that behalf, proceeded to determine and decide and adjudicate the character of each legal subdivision of the lands described in said selection list and with full knowledge of the customs, rules, regulations and requirements of said Board of Land Commissioners of the State of Utah as herein recited, and with full knowledge of the substance of the affidavit made by the President and Secretary of the State Board of Land Commissioners of the State of Utah filed with and accompanying said selection list, and said Commissioner ruled, decided and adjudicated that all of said lands described in said selection list and each and every legal subdivision thereof were not mineral or coal

lands, but on the contrary were non-mineral, agricultural and grazing lands, and thereupon the said Commissioner did allow and approve said selection list and the ruling, decision and adjudication of said Commissioner has never been appealed to the Secretary of complainant's Interior Department and the time for such appeal having expired the said ruling, decision and adjudication of the said Commissioner of the general land office is a conclusive determination and adjudication of the character of said lands [fol. 229] described in said selection list and of every legal subdivision thereof. That each and every one of the representations made by the said Stanley B. Milner and the said State Board of Land Commissioners of the State of Utah, and of its President and Secretary, in the proceedings to acquire title to said lands, were true in substance and in fact and the act of the Commissioner of complainant's general land office in allowing and approving said list was not by reason of any fraud or deceit practiced upon him or complainant's officers or agents. That the said State of Utah on the 1st day of August, 1901, entered into a contract with the said Stanley B. Milner, now deceased, to sell to him all of the lands described in said paragraph 23 of this answer, a copy of which said agreement is hereto attached, marked "Exhibit A" and which these defendants pray may be taken for and made a part of this answer; that the said Stanley B. Milner before his death and before the assignment of said contracts to said Carbon County Land Company, and the said Carbon County Land Company since said transfer have complied with each and every of the terms and conditions imposed upon them under said contract and in so doing among other things have paid to said State of Utah upon the purchase price of said lands the sum of $2448.00.

25. That after the 10th day of December, 1900, and befor, the 1st day of April, 1901, the said Stanley B. Milner after having made application to purchase the lands last above described, became more and more impressed with the idea and opinion that agricultural and grazing lands in the vicinity where said Stanley B. Milner had applied to purchase said lands and elsewhere would rapidly in the future increase in value and become more and more available for agricultural and stock grazing purposes by reason of the

matters things and facts hereinabove related, and during said period of time the said Stanley B. Milner discussed his views upon said subject with Truth A. Milner, his wife, one of the defendants herein, and the said Truth A. Milner being of the same opinion as her husband and expressing a desire of becoming interested in some of the lands in close proximity to where the said Stanley B. Milner had made his selections last above described, the said Stanley B. Milner stated to his said wife that he would make a selection of some of the public lands in the same vicinity and apply to purchase the same from the State of Utah for and on behalf of his said wife, and thereupon and by reason thereof and on or about the said 1st day of April, 1901, the said Stanley B. Milner, as agent of his said wife Truth A. Milner, filed an application, agreement and affidavit with the State Board of Land Commissioners to purchase the [fol. 230] following described tract of land, to wit: the north half of section 26, township 12 south of range 11 east of the Salt Lake Meridian, and that said application, agreement and affidavit was in the same form as that which had been theretofore filed by the said Stanley B. Milner on his own behalf as hereinabove recited, and each of said instruments were subscribed and sworn to by the said Stanley B. Milner as the agent of his said wife and thereafter and on or about the 29th day of March, 1902, by reason of the matters and things above set forth, the said Stanley B. Milner as agent of his said wife, Truth A. Milner, filed an application, agreement and affidavit with the State Board of Land Commissioners for the following described lands, to wit: North half of section 33, township 12 south of range 11 east; lots 1, 2, 3, and southeast quarter of southeast quarter of section 3, township 13 south of range 11 east Salt Lake Meridian and that said application, agreement and affidavit were in the same form as those which had been theretofore filed by the said Stanley B. Milner upon the application made by him personally to purchase lands as hereinabove set forth; that said lands and every legal subdivision thereof appeared upon the maps and records of the local land office at Salt Lake City, Utah, and had been returned as non-mineral and non-coal lands; that prior to the filing of said applications and affidavits and agreements by the said Stanley B. Milner on behalf of his said wife, Truth A. Milner, he had in connection with the said defend-

ant, Samuel H. Gilson, made a complete and thorough examination of said lands and of each and every legal subdivision thereof for the purpose of determining and ascertaining as to whether the same were agricultural, mineral or non-mineral, coal or non-coal lands and as to whether the same or any legal subdivision thereof were more valuable for agricultural purposes than for the mineral or coal deposits which were contained therein, and the said defendants Stanley B. Milner and Samuel H. Gilson by said investigation ascertained and determined that there was not upon said premises or any legal subdivision thereof any disclosure or appearance or outcrop of any nature or description of coal or of mineral bearing rock carrying mineral of any nature or description, and at the time of making said applications and each thereof, and at all times since, all of said premises and each and every legal subdivision thereof were and have been agricultural and grazing lands and not mineral or coal lands and that the same had no value whatever for any coal contained or known to be contained therein, and the only value which said prem-[fol. 231] ises or any of the same had or have was and is for agricultural and grazing purposes, there existing on said lands a good and substantial growth of vegetation and grass, fit for agricultural and grazing purposes and these defendants further state that it was by reason of the idea and opinion of the said Truth A. Milner and the said Stanley B. Milner that said lands would rapidly in the future increase in value and become more and more available for agricultural and stock grazing purposes as hereinabove alleged and not otherwise that said applications, agreements and affidavits to purchase said lands were made by the said Stanley B. Milner for and on behalf of said Truth A. Milner as herein related, but at the time of the making of said applications the said Stanley B. Milner thought that possibly beneath the surface of some parts or portions of said legal subdivisions, (but of which it was impossible for him to determine) and only at great depth there might exist some coal deposits of uncertain and questionable quantity, quality and value, and had advised said Truth A. Milner of his said opinion, but said lands at said time did not, nor did they at any other time herein mentioned, have any value for coal deposits known, believed or presumed to be contained therein, but on the contrary all of said lands were

desirable lands for agricultural and grazing purposes and worth $1.50 and upwards per acre. That at the time of making said applications and each of the same it had been decided, ruled and held by the Commissioner of complainant's land office at Washington, D. C., that none of the public domain or lands of the complainant were coal lands within the contemplation of the law unless and except there be disclosed and appearing thereon a deposit or measure of coal of such proportions, quantity, quality and value as caused the land or some particular legal subdivisions thereof to be chiefly valuable for coal known to exist thereon; that the said Truth A. Milner and Stanley B. Milner at the time of the making of said applications to purchase to the said State Board of Land Commissioners of the State of Utah by the said Stanley B. Milner as the agent of Truth A. Milner knew of and was fully informed as to the substance of the rulings and decisions which had been made theretofore by the Commissioner of complainant's general land office as herein recited, and the said Stanley B. Milner at the time of making said applications as the agent of his said wife Truth A. Milner to purchase said lands knew and was well informed that said lands which he was applying to purchase were non-mineral and non-coal lands within the rulings and decisions of the Com-[fol. 232] missioner of complainant's general land office as herein recited and knew that within said rulings and decisions said lands and each legal subdivision thereof on the contrary were non-mineral and non-coal lands and open to selection by the State of Utah under said grant as agricultural lands, and these defendants further state that said State Board of Land Commissioners of the State of Utah upon receipt on the first day of April, 1901, of said application accompanied by said affidavit and agreement above mentioned made and filed with the Register and Receiver of the land office at Salt Lake City, Utah, a selection list describing said lands and said affidavit accompanied by an affidavit in form and substance as set forth in paragraph 12 of complainant's second amended bill of complaint; that each and every statement contained in said application and affidavit were true; that said Register and Receiver of said land office in performance of their duty forwarded said application and affidavit to the Commissioner of complainant's land office at Washington, and said Commis-

sioner thereupon in performance of his duties in that behalf proceeded to determine, decide and adjudicate the character of each legal subdivision of the lands described in said selection list and with full knowledge of the customs, rules, regulations and requirements of said State Board of Land Commissioners of the State of Utah as herein recited and with full knowledge of the substance of the affidavit made by the president and secretary of said State Board of Land Commissioners of the State of Utah filed with and accompanying said selection list, said Commissioner ruled, decided and adjudicated that all of said lands described in said selection list and each and every legal subdivision thereof were not mineral or coal land but on the contrary were non-mineral, agricultural and grazing lands and thereupon said Commissioner did allow and approve said selection list and certify the same and the ruling, decision and adjudication of said Commissioner has never been appealed to the secretary of complainant's Interior Department and the time for such appeal having expired, the said ruling, decision and adjudication of the said Commissioner is a conclusive determination and adjudication of the character of said lands described in said selection list and every legal subdivision thereof; that each and every one of the representations made by the said Stanley B. Milner as the agent of said Truth A. Milner or otherwise and the said State Board of Land Commissioners of the State of Utah and of its president and secretary in the proceedings to acquire title to said lands were true in sub- [fol. 233] stance and in fact and the act of the Commissioner of the general land office in allowing and approving said list was not by reason of any fraud or deceit practised upon him or any of complainant's officers or agents; that after the allowance and approval of said selection list, and to wit: on the 1st day of February, 1902, the said State of Utah entered into a contract with the said Truth A. Milner to sell to her all of the lands described in paragraph 7 of complainant's second amended bill of complaint substantially in form and substance as set forth in exhibit A attached hereto, except that said contract contained a description of the lands contracted by the said State of Utah to be sold to the said Truth A. Milner, and the said Truth A. Milner before assigning said contract to the Carbon County Land Company and the said Carbon County Land Company

since said assignment have complied with each and every one of the terms and conditions imposed upon them under said contract and in so doing among other things have paid to said state upon the purchase price of said lands the sum of $368.34, and these defendants further state that said State Board of Land Commissioners upon receipt on or about the 29th day of March, 1902, accompanied by said affidavit and agreement above mentioned made and filed with the Register and Receiver of the land office at Salt Lake City, Utah, a selection list describing said lands accompanied by an affidavit in form and substance as set forth in paragraph 12 of complainant's second amended bill of complaint; that each and every statement contained in said application and affidavit were true; that said Register and Receiver of said land office in performance of their duty forwarded said application and affidavit to the Commissioner of complainant's general land office at Washington and said Commissioner thereupon in the performance of his duties in that behalf proceeded to determine, decide and adjudicate the character of each legal subdivision of the lands described in said selection list and with full knowledge of the customs, rules, regulations and requirements of said State Board of Land Commissioners of the State of Utah as herein recited and with full knowledge of the substance of the affidavit made by the president and secretary of said State Board of Land Commissioners of the State of Utah filed with and accompanying said selection list said Commissioner ruled, decided and adjudicated that all of said land described in said selection list and every legal subdivision thereof were not mineral or coal lands but on the contrary were non-mineral, non-coal and [fol. 234] agricultural lands and thereupon said commissioner did allow and approve said selection lists and certify the same and the ruling, decision and adjudication of said Commissioner has never been appealed to the Secretary of Complainant's Interior Department and the time for such appeal having expired the said ruling, decision and adjudication of said Commissioner is a conclusive determination and adjudication of the character of said land described in said selection list and every legal subdivision thereof; that each and every one of the representations made by the said Stanley B. Milner as the agent of said Truth A. Milner, or otherwise, and of the said State Board of Land Commis-

sioners of the State of Utah and of its president and secretary in the proceedings to acquire title to said lands were true in substance and in fact and the act of the Commissioner of the general land office in allowing and approving said lists was not by reason of any fraud or deceit practiced upon him or any of complainant's officers or agents; that after the allowance and approval of said selection list, and to wit; on the 1st day of August, 1903, the said State of Utah entered into a contract with the said Truth A. Milner to sell to her all of the lands described in paragraph 8 of complainant's second amended bill of complaint substantially in form and substance as set forth in exhibit A attached hereto, except that said contract contained a description of the lands contracted by the said State of Utah to be sold to the said Truth A. Milner, and the said Truth A. Milner before assigning said contract to the Carbon County Land Company and the said Carbon County Land Company since said assignment have complied with each and every of the terms and conditions imposed upon them under said contract and in so doing among other things have caused to be paid to said state upon the purchase price of said lands the sum of $459.59.

28. These defendants state that on or about the 17th day of March, 1903, Stanley B. Milner being still of the opinion that agricultural and grazing lands in the vicinity where he had theretofore personally applied to purchase land as herein recited and elsewhere would rapidly in the future increase in value and become more and more available for agricultural and grazing purposes by reason of the matters, things and facts hereinabove related, and further believing that public lands in said vicinity had become more available he made his application to purchase the lands set forth in paragraph 9 of complainant's second amended bill of complaint on the 10th day of December, [fol. 235] 1900, and knowing that vast areas of the public domain since the said 10th day of December, 1900 had been entered for agricultural and grazing lands in said vicinity and elsewhere and knowing that the public domain of lands had become much circumscribed since said 10th day of December, 1900, and being informed and knowing that cattle and stock men were endeavoring to procure leases upon or purchase large tracts of grazing lands of the character of the lands so purchased by him, said Stanley B. Milner, and

of those lands lying in the immediate vicinity and desiring to interest others in a control of a large tract of grazing land believing that an investment in said lands would be a profitable one, with the consent of his brother, Harley O. Milner, filed as the agent of said Harley O. Milner an application, agreement and affidavit with said State Board of Land Commissioners to purchase the following described tract of land, to wit: All of sections 1 and 3, the North half of section 10, the north half of section 11, the north half of section 13, township 13 south, range 10 east Salt Lake Meridian, and that said application, agreement and affidavit was in the same form as that which had theretofore been filed by the said Stanley B. Milner on his own behalf as hereinabove recited and each of said instruments were subscribed and sworn to by the said Stanley B. Milner as the agent of said Harley O. Milner, and that said lands and every legal subdivision thereof appeared upon the maps and records of the local land office at Salt Lake City, Utah, and had been returned as non-mineral and non-coal lands; that prior to the filing of said application, affidavit and agreements of the said Stanley B. Milner on behalf of said Harley O. Milner he had in connection with said defendant Samuel H. Gilson made a complete and thorough examination of said lands and every legal subdivision thereof for the purpose of ascertaining whether the same were agricultural, mineral or non-mineral, coal or non-coal lands and as to whether the same or any legal subdivision thereof were more valuable for agricultural purposes than for mineral or coal deposits which were contained therein, and the said defendants Stanley B. Milner and Samuel H. Gilson by said investigation ascertained and determined that there was not upon said premises or any legal subdivision thereof any disclosure, appearance or outcrop of any nature or description of coal or mineral bearing rock carrying mineral of any nature and description and at the time of making said application and at all times since all of said premises and each and every legal subdivision thereof were and have been agricultural and grazing lands and not mineral or coal [fol. 236] lands, and that the same had no value whatever for any coal contained or known to be contained therein and the only value said premises had or have was and is for agricultural and grazing purposes, there existing on said lands a good and substantial growth of vegetation and grass

fit for agricultural and grazing purposes, and these defendants further state that it was by reason of the idea and opinion of the said Stanley B. Milner that said lands would rapidly in the future increase in value and become more and more available for agricultural and stock raising purposes as hereinabove alleged and not otherwise said affidavit, agreement and application to purchase said lands were made by the said Stanley B. Milner as the agent of said Harley O. Milner as herein recited, but at the time of making said application and affidavit and agreement the said Stanley B. Milner thought that possible beneath the surface of some parts or portion of said legal subdivisions, (but of which it was impossible for him to determine) and only at great depth there might exist some coal deposits of uncertain and questionable quantity, quality and value, but said lands at said time did not nor did they at any other time herein mentioned have any value for coal deposits known, believed or presumed to be contained therein, but on the contrary all of said lands were desirable lands for agricultural and grazing purposes and worth from $1.50 an acre and upwards; that at the time of making said applications and each of the same it had been decided, ruled and held by Commissioner of complainant's general land office at Washington that none of the public domain or lands of complainant were coal lands within the contemplation of the law unless and except there be disclosed and appearing thereon a deposit or measure of coal of such proportions, quantity, quality and value as caused the land or some particular subdivision thereof to be chiefly valuable for coal known to exist thereon, and the said Stanley B. Milner at the time of making said application to purchase to said State Board of Land Commissioners knew of and was fully advised as to the substance of the rulings and decisions which had been made theretofore by the Commissioner of complainant's general land office as herein recited, and knew at the time of making said application and was well informed that said lands which he was applying to purchase on behalf of the said Harley O. Milner were non-mineral and non-coal lands within the rulings and decisions of complainant's general land office as herein recited, and knew that within said rulings and decisions said lands and each legal subdivision thereof were non-mineral and non-coal [fol. 237] lands and open to selection by the State of Utah

under said grant as agricultural lands and these defendants further state that said State Board of Land Commissioners upon receipt on the 17th day of March, 1903, of said application accompanied by said affidavit and agreement above mentioned, made and filed with the Register and Receiver of the land office at Salt Lake City, Utah, a selection list describing said lands and said affidavit accompanying said application was in form and substance as set forth in paragraph 12 of complainant's second amended bill of complaint; that each and every statement contained in said application, agreement and affidavit were true; that said Register and Receiver of said land office in performance of their duty forwarded said application and affidavit to the Commissioner of complainant's land office at Washington and said Commissioner thereupon in performance of his duties in that behalf proceeded to determine, decide and adjudicate the character of each legal subdivision of said lands described in said selection list and with full knowledge of the customs, rules and regulations and requirements of said State Board of Land Commissioners of the State of Utah as herein recited and with full knowledge of the substance of the affidavit made by the president and secretary of said State Board of Land Commissioners filed with and accompanying said selection list, said commissioner ruled, decided and adjudicated that all of said lands described in said selection list and each and every legal subdivision thereof were not mineral or coal lands but on the contrary were non-mineral, non-coal, agricultural and grazing lands, and thereupon said Commissioner did allow and approve said selection list and certify the same and the ruling, decision and adjudication of said Commissioner has never been appealed to the Secretary of Complainant's Interior Department and the time for such appeal having expired said ruling, decision and adjudication of said Commissioner is a conclusive determination and adjudication of the character of said lands described in said selection list and every legal subdivision thereof; that each and every one of the representations made by said Stanley B. Milner as the agent of said Harley O. Milner or otherwise, and of the said State Board of Land Commissioners of the State of Utah and of its president and secretary in the proceedings to acquire title to said lands were true in substance and in fact and the act of the Commissioner of the general land office was

not by reason of any fraud or deceit practiced upon him or any of complainant's officers or agents; that after the allowance and approval of said selection list, and to wit: on the [fol. 238] 1st day of June, 1904, said State of Utah entered into a contract with the said Harley O. Milner to sell to him all of the lands described in paragraph 9 of complainant's second amended bill of complaint substantially in form and substance as set forth in exhibit A attached hereto, except that said contract contained a description of the lands contracted by the State of Utah to be sold to said Harley O. Milner that the said defendant Stanley B. Milner caused said application to purchase said lands to be made in the name of Harley O. Milner because he did not desire the public at large to become informed that he was acquiring a large tract of the public domain until he had in fact acquired the same because he feared that some party or parties might undertake to make applications for such portions of the lands in the immediate vicinity where he desired to acquire lands as would break the contiguity of the legal subdivisions sought to be acquired by him; that said Stanley B. Milner had caused the Carbon County Land Company to be organized on or about the 10th day of March, 1903, as hereinbefore alleged and at the time of making said application as the agent of said Harley O. Milner it was his intention to have the contract procured upon said applicatoin immediately assigned together with all other contracts in which he or others associated with him were interested to the Carbon County Land Company and the taking of contracts in the names of parties other than the said Stanley B. Milner was not with any purpose or intent of concealing the fact from complainant that he, the said Stanley B. Milner, was interested in said lands, or with any ulterior or fraudulent motive, for he, said Stanley B. Milner, had no knowledge that the fact that he might be interested in acquiring the lands described in more than one selection list would in any way effect the action of the Commissioner of the general land office in allowing or approving said selections by the said State of Utah and these defendants are informed and believe and therefore allege the fact to be that the Commissioner of complainant's general land office would not have been influenced or affected in approving any selection list filed by the State Board of Land Commissioners of the State of Utah by reason of the fact

that one individual was interested in the lands described in more than one of said selection lists, and these defendants further state that prior to the 14th day of September, 1903, the said Stanley B. Milner had agreed with the said defendant Samuel H. Gilson, that in consideration for services which had been performed by the said Samuel H. Gilson for [fol. 239] him, the said Stanley B. Milner, in divers and many ways, that if he, the said Samuel H. Gilson, would procure contracts with the State of Utah for the purchase of the lands set forth in paragraph 10 of complainant's second amended bill of complaint and would assign and transfer said contracts to said Carbon County Land Company, that he, the said Stanley B. Milner, would advance the necessary money to make to the said State of Utah the first payment upon the purchase of said lands as required under the provisions of said contract which amounted to the sum of $1,821.13; that thereupon and by reason of said understanding and agreement the said defendant, Samuel H. Gilson, did on or about September 14, 1903, file an application, agreement and affidavit with said State Board of Land Commissioners to purchase the said lands described in said paragraph 10 of complainant's second amended bill of complaint and said application, agreement and affidavit were in the same form as that which had been theretofore filed by the said Stanley B. Milner on his own behalf as hereinabove recited and each of said instruments were subscribed and sworn to by the said Samuel H. Gilson that said lands and every legal subdivision thereof appeared upon the maps and records of the local land office at Salt Lake City, Utah, and had been returned as coal lands, but prior to the filing of said application, affidavit and agreement the said Samuel H. Gilson had made a complete and thorough examination of said land and of each and every legal subdivision thereof for the purpose of determining and ascertaining as to whether the same was agricultural, mineral or non-mineral, coal or non-coal lands, and as to whether the same or any legal subdivision thereof was more valuable for agricultural purposes than for mineral or coal deposits which were contained therein, and said Samuel H. Gilson by said investigation and examination ascertained and determined that there was not upon said premises or any legal subdivision thereof any disclosure, appearance or outcrop of any

nature or description of coal or of mineral bearing rock carrying mineral of any nature or description and at the time of making said application and at all times since all of said premises and each and every legal subdivision thereof were and have been agricultural and grazing lands within the contemplation of the decisions, rulings and adjudications of the Commissioner of complainant's general land office as herein recited and in fact, and the same were not mineral or coal lands and had no value whatever for any coal contained or known to be contained therein and the only value which said premises had or which any legal subdivision thereof had was and is for agricultural and [fol. 240] grazing purposes, there existing on said land a good and substantial growth of vegetation and grass fit for agricultural and grazing purposes, and at the time of making said application to purchase said lands said Samuel H. Gilson was of the idea and opinion that the same would rapidly in the future increase in value and become more and more available for agricultural and stock grazing purposes by reason of the facts, matters and things hereinabove set forth, and it was by reason of said idea and opinion and not otherwise that said Samuel H. Gilson made said application, agreement and affidavit to purchase said lands as herein recited, but at the time of making said application, agreement and affidavit the said Samuel H. Gilson thought that possibly beneath the surface of some parts or portions of said legal subdivisions (but of which it was impossible for him to determine) and only at great depth there might exist some coal deposits of uncertain and questionable quantity, quality and value, but said lands at said time did not nor did they at any other time mentioned herein have any value for coal deposits known, believed or presumed to be contained thereon, but on the contrary all of said lands were desirable for agricultural and grazing purposes and worth $1.50 and upwards per acre; that at the time of making said application it had been decided, ruled and held by the Commissioner of complainant's general land office at Washington, D. C., that none of the public domain or lands of complainant were coal lands within the contemplation of the law unless and except there be disclosed and appearing thereon a deposit or measure of coal of such proportions,

quantity, quality and value as caused the land or some particular subdivision thereof to be chiefly valuable for coal known to exist thereon, and the said Samuel H. Gilson at the time of making said application to purchase to said State Board of Land Commissioners knew and was fully informed as to the substance of the rulings and decisions which had been made theretofore by commissioner of complainant's general land office as herein recited, and at the time of making said application to purchase he knew and was well informed that said lands which he was applying to purchase were in fact non-mineral and non-coal lands and that within said rulings and decisions of said Commissioner said lands and each legal subdivision thereof on the contrary were non-mineral and non-coal lands and open to selection by the State of Utah under said grant as agricultural lands, and these defendants state that said State Board of Land Commissioners of the State of Utah upon receipt on the said 14th day of September, 1903, accom- [fol. 241] panied by said affidavit and agreement above mentioned made and filed with the Register and Receiver of the land office at Salt Lake City, Utah, a selection list describing said lands and accompanied the same by an affidavit in form and substance as set forth in paragraph 10 of complainant's second amended bill of complaint and that each and every statement contained in said application and affidavit were true; that said Register and Receiver in performance of their duty in that behalf set down for hearing upon a day certain, to wit: for the 21st day of December, 1903, the question as to the character of the lands so applied for and each legal subdivision thereof as described in said list, and ordered notice of such hearing to be given to said State Board of Land Commissioners and to be published in a newspaper printed in the English language in the county where said lands were situated according to the rules and regulations of complainant's general land office for such cases made and provided to which rules reference is hereby made, and upon the date set in said notice the State of Utah through its said State Board of Land Commissioners submitted other and further proof as to the non-mineral character of said land, in the nature of 3 affidavits subscribed and sworn to by Wm. Martin—one Haycock and one Haycock to the said Register and Receiver of the local land office in accordance with the rules and regulations thereof,

which was the only proof offered either in support of said selection lists or by parties in protestation or objection thereto, and thereupon the said Register and Receiver of said land office in performance of their duty forwarded the same together with the selection list filed by the State Board of Land Commissioners of the State of Utah and the affidavit made by the president and secretary of said State Land Board on behalf of said Board and accompanying said selection list to the Commissioner of complainant's general land office, and the said Commissioner thereupon in the performance of his duties in that behalf proceeded to determine, decide and adjudicate the character of each legal subdivision of the lands described in said selection list and with full knowledge of the customs, rules, regulations and requirements of said State Board of Land Commissioners of the State of Utah as herein recited and with full knowledge of the substance of the affidavit made by the president and secretary of said State Board of Land Commissioners and filed with and accompanying said selection list and of the substance and contents of the affidavits so submitted and filed with said Register and Receiver at the hearing so had upon the question of the character of said lands, said [fol. 242] Commissioner ruled, decided and adjudicated that all of said lands described in said selection list and each and every legal subdivision thereof were not mineral or coal lands but on the contrary were non-mineral, non-coal, agricultural and grazing lands and thereupon said Commissioner did allow and approve said selection list and certify the same, and the ruling, decision and adjudication of said Commissioner has never been appealed to the Secretary of complainant's Interior Department and the time for such appeal having expired, said ruling, decision and adjudication of said Commissioner is a conclusive determination and adjudication of the character of said lands described in said selection list and every legal subdivision thereof; that each and every of the representations and statements made by the said Samuel H. Gilson, either under oath or otherwise, and of the said State Board of Land Commissioners of the State of Utah and of its president and secretary in the proceedings to acquire title to said lands were true in substance and in fact and the act of the Commissioner of complainant's general land office in allowing and approving said selection list was not by reason of any fraud or deceit

practiced upon him or any of complainant's officers or agents; that after the allowance and approval of said selection list and to wit: on the 15th day of April, 1905, said State of Utah entered into a contract with said Samuel H. Gilson to sell to him all the lands described in paragraph 10 of complainant's second amended bill of complaint substantially in form and substance as set forth in exhibit A attached hereto except that said contract contained a description of the lands contracted by the said State of Utah to be sold to the said Samuel H. Gilson; that thereafter and before the bringing of this suit the said Samuel H. Gilson assigned and transferred to said Carbon County Land Company said contract and all rights accrued or thereafter to accrue to him under the same, and received therefor and in consideration thereof 10,000 shares of the capital stock of said Carbon County Land Company, which under his order has been issued as follows:

To C. L. Gilson 3333 shares; P. L. Gilson 3333 shares, and to Arthur Saunders 3334 shares; that since assigning and transferring to said Carbon County Land Company said contract, it has complied with each and every of the terms and conditions imposed upon the purchaser under said contract and in so doing has paid to said state upon the purchase price of said lands the sum of $265.56.

And these defendants deny any and all manner of unlawful combination and conspiracy wherewith they are by said [fol. 243] bill charged without this there is no other matter, cause or thing in said complainant's second amended bill of complaint contained material or necessary for these defendants to make answer to and not herein and hereby well and sufficiently answered, confessed, avoided or denied as true to the knowledge or belief of these defendants, all which matters and things these defendants are ready and willing to offer, maintain and prove as this honorable court shall direct and humbly pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

Truth A. Milner, Executrix of the Last Will and Testament of Stanley B. Milner, deceased. Truth A. Milner, Samuel H. Gilson. Carbon County Land Company, by Archibald C. Milner, Its President, Defendants. Attest: Harrison E. Jenkins, Secretary. Edwards, Smith & Price, Solicitor for Defendants.

Service of the foregoing Answer accepted this 19th day of November, 1907.

Fred A. Maynard, Attorney for Plaintiff, per L. Trent.

EXHIBIT A TO ANSWER

Claim No. 1594 A. P.

No. 4588, Certificate of Sale, School of Mines Lands

This is to certify that the State of Utah has this day sold unto Stanley B. Milner, of Salt Lake City, County of Salt Lake and State of Utah in the manner provided by law, the following described State School of Mines land, situated and lying in the County of Carbon, State of Utah, to wit:

The southeast quarter (S. E. ¼) and the northwest quarter (N. W. ¼) of Section 22, the east half (E. ½) of Section 27, the south half (S. ½) of Section 33; all of Section 34 and the south half (S. ½) of Section 35 in Township 12 South [fol. 244] Range 11 East of the Salt Lake Meridian, containing nineteen hundred and twenty (1920) acres, more or less, according to the survey of the United States for the sum of two thousand eight hundred and eighty dollars upon the following terms and conditions, to-wit: 25 cents per acre of the purchase price cash in hand and the balance in 10 equal annual payments with interest at the rate of five per cent per annum on deferred payments, interest payable annually in advance on the first day of January of each year. Payments have been made by the said Stanley B. Milner of $480.00 being the 25 cents per acre of the purchase price, and $50.00 being the interest on the unpaid principal from the date of purchase to January 1, 1902. Interest and principal pay able at the office of the State Board of Land Commissioners at the times and in the manner following, that is to say:

Payments No.	Annual payment, principal	Annual payment, interest	Annual payment, total	When due Month, Jan'y	Day	Year
1.....	240	108	348	January	1st	1902
2.....	240	96	336	do.	do.	1903
3.....	240	84	324	do.	do.	1904
4.....	240	72	312	do.	do.	1905
5.....	240	60	300	do.	do.	1906
6.....	240	48	288	do.	do.	1907
7.....	240	36	276	do.	do.	1908
8.....	240	24	264	do.	do.	1909
9.....	240	12	252	do.	do.	1910
10.....	240	..	240	do.	do.	1911

No timber shall be cut on said land except for necessary purposes of fuel for the family of the owner of this certificate residing upon said land, and for the erection thereupon of buildings and fences and repairing the same; and in no case whatever shall waste or spoil be made on the premises.

In case the said Stanley B. Milner, his assigns, heirs or legal representatives shall pay the several sums of money aforesaid punctually at the times above limited, and in all other respects observe and comply with the laws governing the leasing, selling and general management of the Public Lands the State of Utah will, on the surrender of this certificate, cause to be made and executed unto the said Stanley B. Milner, his assigns heirs or legal representatives, a patent therefor. But in case default be made in said payments or either of them, or the law under which this certificate is issued be not observed or complied with, then this certificate shall become null and void and the right and interest of said [fol. 245] purchaser, his assigns, heirs or legal representatives in and to the said land will be declared forfeited in the manner provided by law and the title to said land revert to and revest in the said State of Utah as absolutely and fully as if this certificate had never been issued.

Done at Salt Lake City, Utah, this 1st day of August, 1901.

State Board of Land Commissioners, by Heber M. Wells, President.

Attest: Byron Groo, Secretary.

Recorded in Book E, page 254, of Sales Record.

Mr. Lacy: Can it be stipulated now that on the 8th day of January, 1907, a copy of the original bill of complaint introduced here was delivered to the land board of the State of Utah?

Mr. Wilson: In view of what I am going to read, Mr. Lacy, it will show just what I do admit about that.

The Court: Is this all following the filing of the suit?

Mr. Wilson: Yes.

The Court: Can we have any understanding as to who the persons were?

Whereupon it was agreed by counsel for plaintiff and defendants that Mr. Maynard was the special attorney who

brought the suit in question on behalf of the Government, signed the bill of complaint and tried the case and that Mr. Booth was United States District Attorney for the District of Utah at that time.

Whereupon the defendants offered the following minutes of the State Board of Land Commissioners of the State of Utah, identified as defendants' Exhibit B. The same was then received in evidence by the court, and is in words and figures as follows:

DEFENDANTS' EXHIBIT B

"Copy of Minutes and Proceedings of State Board of Land Commissioners January 8th 1907

"Salt Lake City, Utah,
"Tuesday, January 8th, 1907.

[fol. 246] "The State Board of Land Commissioners met in regular session at its office in the City and County Building at 10:30 o'clock a. m.

"Present: President Lynch and Commissioners Candland, Dixon Hayes, and Thayn.

"Mr. E. W. Senior, attorney for the Estate of S. B. Milner, deceased, and Archibald Milner came before the Board in reference to the request of District Attorney Booth and Attorney Maynard, asking the Board to receive no more payments on certain certificates of sale held by the Milner Estate, and further action on the matter was postponed until 2 o'clock P. M.

"The Board re-convened (ag) 2 o'clock P. M., with all members present.

"Mr. F. E. Maynard, Special Assistant to the Attorney General of the United States, Mr. E. W. Senior, attorney for S. B. Milner Estate, and Archibald Milner came before the Board.

"Mr. Maynard stated that the purpose of his appearing before the Board was to officially inform the Board of the fact that the Attorney General of the United States has caused to be filed a bill of complaint in the Federal Court, and I herewith hand you a copy which I serve upon you and desire to have it become a part of your files. The State of Utah has purposely not been made a party to this bill.

"Mr. Maynard then read the latter part of the bill, and made the following statement:

"You will see that the only relief we ask is that you be relieved from your contract that you entered into with the Milners. That the legal title to the land is in you now and if the Government is successful will be in the State of Utah. We do not seek to deprive you of these lands, but we do seek to prevent these valuable claims from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it.

"He then read the decision in the Supreme Court Decision, 138, page 514, Williams vs. the United States.

"Mr. Senior stated that he would like to have the case settled by the courts, and Mr. Maynard stated that would suit him.

[fol. 247] "Mr. Senior also made the following statement:

"We would not ask for any state patent to issue for these lands until the question of the character of the land is determined by the courts. We claim the lands are such as are subject to selection and the State has entered into a contract and has received payments for the same and there is now payment due for the year 1907, and we ask the State to take it and we will never ask for a patent to issue until the full terms of the contracts have been complied with and all the payments made for the land. We have filed a brief which points out that you cannot go outside of your contract, and we do not want a patent for the land until the contracts are complied with.

"Mr. Maynard: You have all heard what he said and I am satisfied with that. What I am not willing to have is to have a misunderstanding as what the proposition is. Of course it is fair that they have their day in court. That is their privilege. He is willing to let the matter stand until the courts adjudicate upon the question and that is satisfactory to the Government. If we are not right in our contention they are entitled to the lands.

"President Lynch:

"Q. The acceptance of the annual payment would not change the status of the case?

"A. No, not at all.

"Q. The fact of certain assignments having been made to the Carbon County Land Company, would not affect the matter?

"A. No, that is all right. The legal title remains in the State.

"Q. The fact that these assignments have been regularly made on the sale certificates and have been regularly noted on the records would not make any entanglements?

"A. Not at all.

"Mr. Maynard left at this time, and the matter was taken under advisement. Mr. Senior and Mr. Milner also left.

"On motion of Commissioner Hayes the following resolution was adopted:

"Whereas, Fred W. Maynard, special assistant by the [fol. 248] Attorney General of the United States, and Hiram E. Booth, U. S. Attorney for the District of Utah, requested this Board to refrain from accepting further payments, certifying up for patents, or doing anything more towards carrying out its contracts of sale of certain lands, referred to in a bill of complaint hereinafter mentioned, and more particularly described in sale certificates Nos. 4588, 5136, 7174, 8042, 8564, 8365, 8500, 8074, 7112 and 7108, to Truth A. Milner, executrix of the estate of Stanley B. Milner, deceased; Truth A. Milner, Harley O. Milner, Samuel H. Gilson, Peter N. Campbell, and the Carbon County Land Company, a corporation;

"And Whereas, the said applicants for said lands, by their attorneys, Higgins and Senior, have made demand upon this Board to carry out its contract with said applicants, according to the terms thereof, regardless of the requests of the said U. S. Attorneys to the contrary, to the extent of receiving and accepting the annual payments due upon said lands;

"And Whereas, the said Fred W. Maynard appeared in person before this Board this 8th day of January, A. D. 1907, and formally notified it that the United States of America had filed a bill of complaint in equity in the circuit court of the United States, Eighth Circuit in and for the District of Utah, against the said applicants above named, who are made defendants in said bill of complaint, a copy of which said complaint was served upon this Board, praying, among other things, that the court adjudge and decree that said contracts made and entered into between the said defendants and the State of Utah are void and that each be surrendered for cancellation; and the said applicants, be-

ing represented before said Board by their said attorney, E. W. Senior;

"And Whereas: It was stipulated and agreed in the presence of and before this said Board by the said Fred W. Maynard, attorney for the United States and the said E. W. Senior, attorney for said applicants, who are named as defendants in said bill of complaint, that the said contracts between this Board and the said applicants shall remain in statu quo during the pendency of said action brought in said circuit court, with the understanding that this Board accept the annual payments upon said land yearly as they become due, on condition that the said applicants will not attempt, under any circumstances, to make payment in full for said land and demand the issuance of patent thereto until their rights to acquire title to said lands are adjudicated;

[fol. 249] "Now, Therefore, be it resolved by this Board that the annual payments upon said lands now tendered by said applicants and subsequent annual payments, as they fall due, be accepted, but that final payment upon said lands shall not be accepted by this Board until the rights of said applicants to demand a patent for said lands shall have been determined by said court.

"State of Utah,
County of Salt Lake, ss:

"I, Arthur Kuhn, Secretary of the State Board of Land Commissioners in and for the State of Utah, hereby certify that the foregoing is a full, true and correct copy of the minutes of the meeting of the Board held on Tuesday, January 8, 1907, as appears of record in Minute Book 'I,' pages 357, 358 and 359.

"In Witness Whereof, I have hereunto affixex the seal of the State Board of Land Commissioners this 16th day of September, A. D. 1920.

"Arthur Kuhn, Secretary of State Board of Land Commissioners, Utah. (Seal.)"

PLAINTIFF'S EXHIBIT 3

Plaintiff thereupon offered in evidence a certified copy of the list of lands selected by the State of Utah, marked Salt

Lake City List 04086, marked Government's Exhibit 3, which is in words and figures as follows:

"B". K R T

United States Department of the Interior, General Land Office, Washington

March 15, 1929.

"I hereby certify that the annexed copies of letters and papers, filed under Salt Lake City 04086, Ex. 3, Govt., are true and literal exemplifications of the originals on file in this office."

"In Testimony Whereof I have hereunto subscribed my [fol. 250] name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written."

Thos. O. Havell, Assistant Commissioner of the General Land Office. (Government Seal of United States General Land Office.)

In reply please refer to: Salt Lake City 04085 and 04086 "FS"—"ACB".

48. ACB. F-25 FM.

Department of the Interior, General Land Office, Washington

"Address only the Commissioner of the General Land Office."

June 27, 1913.

Directing that certified copies be prepared.
Chief of "C".

SIR: You will have prepared at your earliest convenience and furnish to Division "FS," for use in certain court proceedings, certified copies of Agricultural College List No. 71, now 04085 Salt Lake City, Utah, series, of the State of Utah, and Deaf and Dumb Asylum Selection No. 52, no 04086, Salt Lake City series, of the State of Utah."

"The selection records are furnished herewith. You will return them to division "FS" with the certified copies."

Respectfully, —— ——, Assistant Commissioner.

6-26 JK. F-26.

"Tracts in this list in Tp. 13 S., R. 11 E., may now be clear listed so far as N. is concerned." ECF. N.

[fol. 251] Utah State List No. 52, Deaf and Dumb Asylum, Sept. 15, 1903

Part of section	Sec.	Township	Range	Area Acres	Area Fraction	
Lot 2	x 30	16 S.	2 E.	28	07	Mineral 14
N. W. ¼ S. W. ¼	x 26	39 S.	9 W.	40	36	S. W. 105
N. E. ¼ S. E. ¼	x 27	39 S.	9 W.	40		Mineral "
S. W. ¼ S. E. ¼	x 34	39 S.	9 W.	40		"
E. ½ S. E. ¼	x 34	39 S.	9 W.	80		"
N. W. ¼ S. W. ¼	x 35	39 S.	9 W.	40		Coal Ret. "
S. E. ¼ S. W. ¼	6	19 S.	8 E.	40	17	S. E. 218
N. E. ¼ N. W. ¼	7	19 S.	8 E.	40		219
N. E. ¼ N. W. ¼	x 20	3 S.	4 E.	40	2	S. E. 151
Lot 4	x 21	3 S.	4 E.	39	92	Mineral Return "
S. ½ N. E. ¼	7	21 S.	3 W.	80	14	22 S. W. 3
N. ½ S. E. ¼	7	21 S.	3 W.	80		"
S. E. ¼	x 11	x13 S.	10 E.	160	18	S. E. 148
S. E. ¼	x 12	13 S.	10 E.	160	Coal Ret. "	
E. ½ N. E. ¼	x 14	13 S.	10 E.	80		149
Lot 1	x 7	13 S.	11 E.	43	19	S. E. 27
N. E. ¼ N. W. ¼	x 7	13 S.	11 E.	40		"
N. E. ¼	x 7	13 S.	11 E.	160		"
N. ½ S. E. ¼	x 7	13 S.	11 E.	80		"
S. E. ¼ S. E. ¼	x 7	13 S.	11 E.	40		"
S. E. ¼ S. W. ¼	x 17	35 S.	2 E.	40	Min. 14	S. E. 54
N. E. ¼ S. E. ¼	x 25	37 S.	10 W.	40	36	S. W. 201
Lot 5	x 1	38 S.	10 W.	34	51	Mineral 205
				1,465	50	

Rubber Stamp: Patent to Contain Reservations, Conditions and Limitations of March 3, 1886, 35 Stat. 844.

105 and 110 and 115

(Illegible Typewriting.)

Remarks

"Sept. 25, 1903, notice for publication issued for the Iron County Record of Cedar City, Utah, and delivered to the State Board of Land Commissioners personally.

Sept. 25, 1903, notice for publication issued for the Manti Messenger of Manti, Utah, and delivered to the State Board of Land Commissioners personally.

[fol. 252] Adjudged non usual by N. to R. & R., Nov. 7, 1904, C. A. H.

Sept. 25, 1903, notice for publication issued for the Iron County Record of Cedar City, Utah, and delivered to the

x Mineral publication made ..... 38448 171822 —08

State Board of Land Commissioners personally. Hearing set for December 21, 1903, at 10 a. m.

Adjudged non-usual by N. to R. & R., Nov. 7, 1904, C. A. H.

Sept. 25, 1903, notice for publication issued for the Park Record of Park City, Utah, and delivered to the State Board of Land Commissioners personally. Hearing set for December 21, 1903, 10 a. m.

1904—96559 usual protest—Nov. 5, 1904, to R. & R. ordering hearing, C. A. H.

May 11, 1905, to R. & M. dismissing protest.

Adjudged non usual by N. to R. & R., Nov. 7, 1904, C. A. H.

Sept. 25, 1903, notice for publication issued for the Eastern Utah Advocate of Price, Utah, and delivered to the State Board of Land Commissioners personally. Hearing set for December 21, 1903, at 10 o'clock a. m.

Adjudged non usual by N. to R. & R., Nov. 7, 1904, C. A. H.

C. D. S. No. 1743 filed March 31, 1902, by Inez Knight for the N. E. ¼ section 7, township 13 south, range 11 east, S. L. M.

C. D. S. No. 1741, filed March 15, 1902, by Robert E. Allen for the S. E. ¼ section 7, township 13 south, range 11 east, S. L. M.

Sept. 25, 1903, notice for publication issued for the Panguitch Weekly Progress, of Panguitch, Utah, and delivered to the State Board of Land Commissioners personally.

Sept. 25, 1903, notice for publication issued for the Iron County Record of Cedar City, Utah, and delivered to the State Board of Land Commissioners personally.

F. S.—3 B. Ex. 3. F-28.

"STATE OF UTAH,
County of Salt Lake, ss:

We, Heber M. Wells and Byron Groo, authorized Agents of the State Board of Land Commissioners of the State of Utah, being first duly sworn, depose and say that the foregoing lists of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, [fol. 253] under Section 12 of an Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted, mineral nor re-

served lands, and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employes of the State as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel or other valuable mineral deposits, that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof. That the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named. That the land contains no salt Spring, or deposits of salt in any form sufficient to render it valuable therefor.

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Subscribed and sworn to before me this 15th day of Sept., 1903. Ellridge L. Thomas, Notary Public.

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the State of Utah under the grant to it by the Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government and to be admitted into the [fol. 254] Union on an equal footing with the original States," approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify that the filing of said list has been allowed and approved and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any

part thereof, returned and denominated as mineral lands or land nor claimed as swamp land; neither are they homesteads, pre-emptions nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing lists shows an assessment of the fees payable to us, and that the said State of Utah has paid to the undersigned, the receiver, the full sum of Twenty Dollars in full payment and discharge of said fees.

Frank D. Hobbs, Register U. S. Land Office, Salt Lake City, Utah. Geo. A. Smith, Receiver U. S. Land Office, Salt Lake City, Utah.

160 acres pending, in coal withdrawal—June 25, '07 (?).
Grant: Deaf and Dumb.
No. of List: 52.
No. of Acres: 1,465.50.

Utah Land District

Received and filed Sept. 17, 1903.
Approved Sept. 25, 1903.
Deseret News.
Posted Oct. 24, 1903, W. S. T.
Miss. Pubn. 38448 and 43720.
1904 1904
Park in Appd. List 10-12-1-04.
U. S. General Land Office, Received Sept. 30, 1903.
Ex. 3, Plff. 164,233.

J. W. C. Ex. 3. F-29.

State Board of Land Commissioners, Salt Lake City, Utah

Sept. 15th, 1903.

I, Byron Groo, Secretary of the State Board of Land Commissioners of the State of Utah, hereby certify that Heber M. Wells and Byron Groo are the duly appointed [fol. 255] agents of said board for the selection of lands under the grants by the United States to the State of Utah.

Byron Groo, Secretary State Board of Land Commissioners

List No. 52, Deaf and Dumb Asylum

List of Lands Selected by State of Utah

The undersigned, the duly authorized agents of the State Board of Land Commissioners of the State of Utah, under

and by virtue of the Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of the surveyed, unappropriated, unreserved, non-mineral public lands of the United States lying within the State of Utah, said lands being selected and to be applied under Section 12 of said Act of Congress "for the establishment and maintenance of a Deaf and Dumb Asylum.-

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Ex. 3, F-30.

Department of the Interior, United States Land Office

Salt Lake 04086. State Sel. Deaf & Dumb Asylum. List 52, Election, Act Mar. 3, -909. 1 Enc. C. F. S.

Salt Lake City, Utah, July 9, 1909.

Hon. Commissioner General Land Office, Washington, D. C.

Sir, I have the honor to transmit herewith the election of the State of Utah to take patent exclusive of coal in the matter of State Selection, Deaf & Dumb Asylum, List 52, Serial No. 04086, for the S. E. ¼, Sec. 11, T. 13 S., R. 10 E., S. L. M.

[fol. 256]. The same is transmitted for such action as is deemed necessary and proper in the premises.

Very respectfully, E. D. R. Thompson, Register."

Rubber Stamp: Received July 13, 1909, 04086, O. L. O.

Ex. 3, F. 31. 08-171822.

Department of the Interior, General Land Office, Special Service Division

11/20, 1908.

"Chief of Division C:

Please cause to be noted on tract books opposite S. E. ¼, Sec. 11, T. 13 S., R. 10 E., S. L. Mer. Utah land district.

"Deaf & Dumb Asylum List 52, Protest in P. 08-171822."
H. E. B.

Entry of record: P. —. (If entry of record, annotation not necessary.)
Noted Nov. 21, 1908. Jas., Div. C.
Return this card for filing with ——.
Closed in favor of —— by report of 12/8/13.
Protest dismissed.

A. C. B., Clerk.

1/28/15. F. S.
Noted. Noted —— —, 19—. D. B. M. (?). Div. C.
17278blom3-05. 04086.
Ex. 3, F. 32.

4-357

Serial No. 04086

(Form approved by the Secretary of the Interior Mar. 25, 1909.)

Department of the Interior

[fol. 257] Notice of Right of Election (Act of March 3, 1909)

No. —

U. S. Land Office

—— —, 19—.

—— ——.

SIR: Your attention is directed to the provision of the Act of March 3, 1909, on the back hereof, and you are hereby allowed sixty days from notice within which to file in this office your election to take patent for the lands embraced in your selection, Deaf & Dumb List Number 52, made Sept. 17, 1903, for S. E. ¼, Section 11, Township 13 S., Range 10 E., S. L. Meridian, such patent to reserve to the United States all coal in the lands with the right of the United States, or persons authorized by it, to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of said act;

or to deny the existence of known deposits of valuable coal upon the land at date of final proof and entry, in which event you must file in this office within the time prescribed, evidence in the form of affidavit statements by persons familiar with the lands, preferable mineral experts or practical miners, alleging the lands to be noncoal in character, with the reason therefor. If you fail to within sixty days from receipt of this notice file your said election, or to deny the existence of known deposits of valuable coal in the land, patent will issue on submission of final proof satisfactory in other respects, reserving to the United States all the coal in the land.

Respectfully, —— ——, Register. —— ——, Receiver.

Election to Receive Patent Upon Non-mineral Claim Exclusive of any Deposits of Coal in the Land

STATE OF UTAH,
County of Salt Lake, ss:

I, W. H. Farnsworth, of town of Salt Lake City, Secretary State Board Land Commissioners, County of Salt Lake, State of Utah, who on Sept. 17, 1903, made selection No. 52, for the S. E. ¼, Section 11, Township 13 S., Range 10 E., S. L. Meridian, being duly sworn, do hereby elect, upon submission of satisfactory proof of compliance with [fol. 258] law under which my claim was initiated, to receive patent for the lands, which patent shall reserve to the United States, or any person authorized by it, to prospect for, mine, and remove the coal from same in accordance with the conditions and limitations of the Act of March 3, 1909, Public No. 323.

In accordance with the above election, I hereby authorize the proper officer or officers of the United States, upon submission of satisfactory final proof upon my location, selection or entry, to issue final certificate or other paper as basis for patent, containing the reservation of the coal hereinbefore described, and to issue patent in accordance therewith.

W. H. Farnsworth, Secretary State Board Land Commissioners.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature

thereto; that affiant is to me personally (known or has been satisfactorily identified before me by personally known); and that said affidavit was duly subscribed and sworn to before me at my office in Salt Lake City, Utah, this 3rd day of July, 1908.

O. P. Eldeed, (?) Official Designation of Officer: Notary Public.

NOTE 1.—This affidavit of election may be executed before any officer authorized to administer oaths and possessed of a seal.

NOTE 2.—The attention of parties in interest is directed to the provisions of the Act of March 3, 1909, copy of which is printed below.

(Public—No. 323.) (H. R. 24834)

An Act for the Protection of the Surface Rights of Entrymen

By it enacted by the Senate and House of Representatives of the United States of America *of America* in Congress assembled That any person who has in good faith located, selected or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are [fol. 259] claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction; Provided, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit; Provided, further, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the char-

acter of the land located, selected, or entered by him. Such locater, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved March 3, 1909.
6-1531.

Mr. Lacy: Exhibit 4 is a copy of selected lists No. 67 with the application of the State to select those lands and the approval of the selection. These records are from the General Land Office certified to by the Acting Commissioner of the General Land Office.

Mr. Wilson: May we have this stipulation, that if Mr. Candland was called as a witness he would testify that these proceedings that I have read, the minutes from the State Land Board took place as of the date mentioned? Mr. Candland was a member of the board and I mentioned him because he would be available.

Mr. Lacy: It is admitted that he would so testify if called as a witness.

Government's Exhibt 4 was then read in evidence in words and figures as follows:

[fol. 260] GOV'T EXHIBIT 4

"B". K R T

United States Department of the Interior, General Land Office, Washington

March 20, 1929.

I hereby certify that the annexed copy of selection list No. 67, is a true and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

D. K. Parrott, Acting Assistant Commissioner of the General Land Office. (Government seal of United States General Land Office.)

Ex. 4.

State Board of Land Commissioners, Salt Lake City, Utah

April 22nd, 1901.

I, Byron Groo, Secretary of the State Board of Land Commissioners of the State of Utah, hereby certify that Heber M. Wells and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the State of Utah.

Byron Groo, Secretary State Board of Land Commissioners.

List No. 67, Agricultural College

List of Lands Selected by State of Utah

The undersigned, the duly authorized agents of the State Board of Land Commissioners of the State of Utah, under and by virtue of the Act of Congress, entitled "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894, and under and in pursuance of the rules and regulations and prescribed by the Commissioner of the General Land Office, [fol. 261] hereby make and file the following list of selections of the surveyed unappropriated, unreserved, non-mineral public lands of the United States lying within the State of Utah, said lands being selected and to be applied under Section 8 of said Act of Congress "for use of an Agricultural College."

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Ex. 4.

Utah State List No. 67, Agricultural College, April 22, 1901

Part of section	Sec.	Township	Range	Area	
				Acres	Fraction
N. ½ O. K.	26	12 S.	11 E.	320	19
S. ½ O. K.	26	12 S.	11 E.	320	
N. ½ O. K.	35	12 S.	11 E.	320	
				960	

STATE OF UTAH,

County of Salt Lake, ss:

We, Heber M. Wells and Byron Groo, authorized Agents of the State Board of Land Commissioners of the State of

Utah, being first duly sworn, depose and say that the foregoing lists of lands hereby selected is a correct list of a portion of the public lands selected by the State of Utah, under Section 8 of an Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employes of the State, as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel or other valuable mineral deposit; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that our application therefore is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above [fol. 262] and foregoing statements as to the character of said land apply to each and every legal subdivision thereof. That the said selections and those pending, together with those approved, do not exceed the amount granted to the State for the purpose named.

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Subscribed and sworn to before me this 22nd day of April, 1901. Elbridge L. Thomas, Notary Public.

United States Land Office, Salt Lake City, Utah

We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the State of Utah under the grant to it by the act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894, and we have tested the accuracy

of said list by the plats and records in the office, and we find the same to be correct; and we further testify, that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and the same are not, nor is any part thereof, returned and denominated as mineral lands or land, nor claimed as swamp land; neither are there any homesteads, pre-emptions nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us, and that the said State of Utah has paid to the undersigned, the receiver, the full sum of — Dollars in full payment and discharge of said fees.

Frank D. Hobbs, Register U. S. Land Office, Salt Lake City, Ut. George A. Smith, Receiver U. S. Land Office, Salt Lake City, Ut.

Ex. 4, plff. J.W.C. Ex. 4.

[fol. 263] Grant: Agricultural College. Not of List: 67. No. Acres: 960. Received and filed Apr. 23, 1901 (?). Approved Apr. 29, 1901. Posted May 23, 1901. C. J. S. See approved list 6. Finished.

Whereupon the Government's Exhibit 5 was offered and read in evidence as follows:

Gov't Exhibit 5

"B." K R T

United States Department of the Interior, General Land Office, Washington

March 16, 1929.

I hereby certify that the annexed copies of letters and papers, filed under Salt Lake City 04085, are true and literal exemplifications of the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

Thos. O. Havell, Assistant Commissioner of the General Land Office. (Government Seal of the United States General Land Office.)

Ex. 5, E. 38.

Milner Corporation, Salt Lake City, Utah
January 21st, 1915.

Sub. to reqst. (1)
Mr. Clay Tallman, c/o General Land Office, Washington, D. C.

My Dear Mr. Tallman: During the summer of 1913, while I was in Washington, I brought to your attention the long delay in making approval to certain state selections upon which elections to take surface had previously been filed under the terms of the law of 1910, separating surface from minerals, the numbers being 04085 and 04086, Salt Lake City. You instructed that the matter be taken up with the [fol. 264] Special Agents Division, Salt Lake, for approval.

I was informed by Special Agent Hair last summer that these selections had been approved by him on December 9th, 1913, and forwarded to the Commissioner of the General Land Office something over a year ago. The State of Utah has not yet received certification of these lists and I therefore take the liberty of bringing the matter to your personal attention to the end that the matter may be facilitated.

Inasmuch as these lists would be certified to the state with mineral reservation to the Government, we can see no reason for further delay on the part of the General Land Office in the matter.

I trust that I am not imposing upon your time in bringing the matter to your attention.

With kind regards, I am

Very truly yours, A. C. Milner.

ACM:VR.

Rubber Stamps: Referred to —— —— For recommendation. —— Pr. C. —— Filing. —— Reply. —— Conference. —— Report. ——Information.

Memo for Reply.

2—Received Jan. 25, 1915, G. L. O. Ex. 5. "G".

[fol. 265] Memorandum

Salt Lake City No. 04085, Agricultural College grant, contains unapproved selections to the amount of 3,192.07 acres, which have been embraced in clear list No. 19, which has just been prepared for submission to the Department

for approval. This list will be submitted to Board of Law Review tomorrow, the 26th.

Salt Lake City No. 40486, under the grant for the Deaf and Dumb Asylum, contains a selection of 160 acres, not yet approved. It appears that this selection may be embraced in the next clear list, under this grant, prepared for Department approval. List will be prepared within the next 10 days.

(These selections were clear-listed by Division "FS," in May, 1914, upon receipt of the required reports from the Geological Survey.)

G. B. Dreisbock, Chief Div. "G."

1/25/15.
Letter herewith. G. B. D. / G.

[fol. 266] Utah State List No. 71, Agricultural College, April 2, 1902

Part of section	Sec.	Township	Range	Areas Acres	Areas Fraction
Lots 2 & 3	10	14 N.	6 W.	78	99
E. ½ S. W. ¼	10	14 N.	6 W.	80	
S. E. ¼	10	14 N.	6 W.	160	
S. E. ¼	23	16 S.	1 E.	160	
S. W. ¼	24	16 S.	1 E.	160	
N. ½ N. E. ¼	26	16 S.	1 E.	80	
S. E. ¼ N. E. ¼	26	16 S.	1 E.	40	
S. E. ¼ N. W. ¼	11	17 S.	1 E.	40	
W. ½ S. E. ¼	11	17 S.	1 E.	80	
E. ½ S. W. ¼	11	17 S.	1 E.	80	
W. ½ N. E. ¼	14	17 S.	1 E.	80	
N. E. ¼ N. W. ¼	14	17 S.	1 E.	40	
S. W. ¼ Pul. 38604—1902	27	15 S.	5 E.	160	Mineral
N. ½	33	12 S.	11 E.	320	
All	1	13 S.	11 E.	317	52 Mineral
All	12	13 S.	11 E.	640	Coal Ret.
All	11	13 S.	11 E.	640	Coal Ret.
E. ½ S. E. ¼	10	13 S.	11 E.	80	Coal Ret.
E. ½ N. E. ¼	10	13 S.	11 E.	80	Coal Ret.
Lot 1	3	13 S.	11 E.	39	Mineral
S. E. ¼ S. E. ¼	3	13 S.	11 E.	40	Mineral
Lot 2	3	13 S.	11 E.	39	Mineral
Lot 3	3	13 S.	11 E.	39	Mineral
All	4	13 S.	11 E.	316	12 Mineral
All	5	13 S.	11 E.	315	84 Mineral
All	6	13 S.	11 E.	323	55 Mineral
N. W. ¼ S. W. ¼	8	13 S.	11 E.	40	Coal Return
N. ½ N. E. ¼	8	13 S.	11 E.	80	Coal Return
N. ½ N. W. ¼	8	13 S.	11 E.	80	Coal Return
S. W. ¼ N. W. ¼	8	13 S.	11 E.	40	Coal Return
S. E. ¼ N. E. ¼	8	13 S.	11 E.	40	Coal Return
S. W. ¼ N. W. ¼	9	13 S.	11 E.	40	Coal Return
N. ½ N. W. ¼	9	13 S.	11 E.	80	Coal Return
				40	

Part of section	Sec.	Township	Range	Areas Acres	Areas Fraction
N. W. ¼ N. E. ¼	9	13 S.	11 E.	40	.. Coal Return
S. E. ¼ N. E. ¼	9	13 S.	11 E.	40	.. Coal Return
Lot 4	3	13 S.	11 E.	39	04 Mineral
S. W. ¼ S. W. ¼ (Lot 5)	3	13 S.	11 E.	40	.. Mineral
				5028	

See if Lot 4 is in appd. List #8. No. J. E. S.

[fol. 267] Two Rubber Stamps reading: Patent to Contain Reservations, Conditions, Limitations or March 3, 1903 (35 Sta., 844).

319207. F. S.—1A.

E. 14, Ex. 5, J. W. C.

(26)

State Board of Land Commissioners, Salt Lake City, Utah

April 2nd, 1902.

I, Byron Groo, Secretary of the State Board of Land Commissioners of the State of Utah, hereby certify that Heber M. Wells and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the State of Utah.

Byron Groo, Secretary State Board of Land Commissioners.

List No. 71, Agricultural College

List of Lands Selected by State of Utah

The undersigned, the duly authorized agents of the State Board of Land Commissioners of the State of Utah, under and by virtue of the Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of the surveyed, unappropriated, unreserved, non-mineral public lands of the United States lying within the State of Utah,

said lands being selected and to be applied under section 8 of said Act of Congress "for the use of an Agricultural College."

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Ex. 5: E-42. FS-3A.

Remarks

April 7th, 1902, notice for publication issued for the Mt. Pleasant Pyramid, of Mt. Pleasant, Utah, and delivered to the State Board Land Commissioners personally.

[fol. 268] April 7th, 1902, notice for publication issued for the Eastern Utah Advocate of Price, Utah, and delivered to the State Board of Land Commissioners personally.

Hearing called at this office for June 17, 1902, at 10 o'clock a. m., to determine the character of the tracts returned as Coal Land, April 7, 1902, notice for publication issued for the Eastern Utah Advocate of Price, Utah, and delivered to the State Board Land Commissioners personally.

Notice issued for the Eastern Utah Advocate of Price, Utah, same as above.

Notice issued and hearing called same as above.

Canceled Nov. 5, 1902, as to E. ½ N. E. ¼, Sec. 9, Tp. 13 S., R. 11 E.

E. C. F., N.

Notice issued for the Eastern Utah Advocate same as above.

Canceled upon relinquishment July 19, 1902.

E. C. F., N.

Fs-4A. Ex. 5. C-43.

STATE OF UTAH,
County of Salt Lake, ss:

We, Heber M. Wells and Byron Groo, authorized Agents of the State Board of Land Commissioners of the State of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under Section 8 of an Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and

State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employes of the State as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel or other valuable mineral deposits; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during [fol. 269] any part of the year by any person or persons; that said land is essentially non-mineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to character of said land apply to each and every legal subdivision thereof. That the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named; that the land contains no salt spring, or deposits of salt in any form sufficient to render it valuable therefor."

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Subscribed and sworn to before me this 2nd day of April, 1902. Ellibridge L. Thomas, Notary Public.

Ex. 5.

United States Land Office, Salt Lake City, Utah

——, 190–.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the State of Utah under the grant to it by the Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitu-

tion and State Government and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify, that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral lands or land nor claimed as swamp land; neither are there any homesteads, pre-emptions nor other valid claim save as herein noted to any portion of said land on file or record in this office. We further certify that the foregoing list shows as assessments of the fees payable to us, and that the said State of Uah has [fol. 270] paid to the undersigned, the receiver, the full sum of — Dollars in full payment and discharge of said fees.

Frank D. Hobbs, Register U. S. Land Office, Salt Lake City, Ut. Geo. A. Smith, Receiver U. S. Land Office, Salt Lake City, Ut.

Ex. 5, E-43.
Fs-4A. 332/5.
Coal land only pending. RMG (?). 3,192.07 pending (?).
Grant: Agricultural College. Ex. ?, plff. JWC.
No. of List: 71.
No. of Acres: 5,028.10.
Approved in part July 9, 1903.
List 8, Utah Land District.
Posted April 28, 1902. C. J. D.
July 19, 1902, R. & R. & atty. E. C. F. 68848/N 02.
Nov. 5, 1902, R. & R. & atty. E. C. F.
May 4, 1903, Refd. to Div. G. E. C. F.
See appearance of W. O. S. Curtis.
116,144—1902. O. R.
Sept. 25, 1903, R. & R. & Attys. E. C. F.
78248. W. T. S. Curtis appears for state.
Oct. 9, 1903, ——? E. C. F.
Sec. 138,270—1904, Spl. Agt. Rept.
1902—60891—1—Over.
Ex. 5. #44 FM.
In reply please refer to Salt Lake City 04085 & 04086, "FS"—ACB ACB.

[fol. 271] Department of the Interior, General Land Office, Washington

Address only the Commissioner of the General Land Office.

Directing that certified copies be prepared.

June 27, 1913.

Chief of "C."

SIR: You will have prepared at your earliest convenience and furnish to Division "FS," for use in certain court proceedings, certified copies of "Agricultural College List No. 71, now 04085, Salt Lake City, Utah, series, of the State of Utah and Deaf and Dumb Asylum Selection No. 52, now 04086, Salt Lake City, Utah, series of the State of Utah.

The selection records are furnished herewith. You will return them to division "FS" with the certified copies.

Respectfully, C. M. Bruce, Assistant Commissioner.

6-25 JK. Ex. 5. E-45.

Public Land Law Contests a Specialty. Correspondence Solicited

B. C. Tiffany, Attorney-at-law, Atlantic Building, Washington, D. C.

Aug. 7, 1903.

Hon. Commissioner General Land Office.

SIR: Referring to the suspension of Salt Lake City, Utah, Agricultural College List No. 71 and University List No. 44 in behalf of S. B. Ueilner (?), a purchaser from the state of certain lands in Tp. 13 S., R. 11 E., embraced in said list, I herewith file the affidavit of A. R. Talamanter and others as to a character of said lands. In view of the statements made —??— by these parties showing that these lands are grasing and agricultural in character, and not mineral or coal lands, I would request that the suspension be removed.

Very respectfully, B. C. Tiffany.

[fol. 272] Ex. 5. E-46.

34/10 S R.

U. S. General Land Office. Received Aug. 7, 1903. 134,-443. 239/55.

August 7, 1903.

B. C. Tiffany, city, files affidavits in relating to the character of lands in Tp. 13 S., 11 E., Utah. Refd. to Div. "G" Sept. 1, 1903. JCY (?) canc.

Referred to N. Sept. 4, 1903. JR canc. I. R. C.

Chief G.

To R. & R. & Attys. Sept. 25/03. ECF Lists 71, Agri. College & 44 N. 91, 1323.

Ex.-5, E-47.

Notice for publication in the Iron County Record, Cedar City, Utah, December 24, 1900, and delivered personally to State Board Land Commissioners.

Non-mineral proof accepted N. June 12, 1901, C. A. H.

Hearing ordered for the 21st of March, 1901, to determine the character of the land before this office, notice for publication issued for the Iron County Record, Cedar City, Utah, and delivered to the State Board Land Commissioners personally.

Notice for publication issued December 24th, 1900, for the Iron County Record, Cedar City, Utah, and delivered to State Board Land Commissioners personally.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the State of Utah under the grant to it by the Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted to the Union on an equal footing with the original States," approved July 16, 1894; and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify, that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral lands or and, [fol. 273] nor claimed as swamp land; neither are there any homesteads, pre-emptions nor other valid claim except as herein noted to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us and that the said State of Utah has paid to the undersigned, the receiver, the

full sum of Seventy-two Dollars in full payment and discharge of said fees.

Frank D. Hobbs, Register U. S. Land Office, Salt Lake City, Utah. Geo. A. Smith, Receiver U. S. Land Office, Salt Lake City, Utah.

5/332. Ex. 7 plff. J. W. C.
Grant: School of Mines.
No. of List: 32.
No. Acres: 5,662.08.
Utah Land District.
Received and filed December 18, 1900.
Approved Dec. 24, 1900.
Deseret News 3/29/01, to G. Pallock, N. G. P.
App. in part list 5. App. June 27, '02, list 6.
Posted Feb. 1, 1901. C. J. D.
Finished 1900—173,877—1.

June 1, 1907. E-50.

All lands pending embraced within coal withdrawals. Section 1 to 18 we returned as coal.

"H." ECF.

Register and Receiver, Salt Lake City, Utah.

Sirs: Your letter of June 13, 1902, forwarded the application of Hulda Sjeberg to amend her coal declaratory statement No. 1745 from the N. E. ¼ S. E. ¼ of Sec. 9, N. W. ¼ S. W. ¼ and W. ½ *M.* W. ¼, Sec. 10 Tp. 13 S. R. 11 E. to the E. ½ N. E. ¼ Sec. 9, S. W. ¼ N. W. ¼ and [fol. 274] N. W. ¼ S. W. ¼ of Sec. 10, same township and range. The E. ½ N. E. ¼, Sec. 9 being covered by the State Selection List No. 71, (Agricultural College), you were by office letter of July 10, 1902 directed to allow the State of Utah sixty days from notice within which to show cause why said selection list should not be canceled as to said tract and the application of Sjorberg to amend be allowed.

I am now in receipt of your letter October 18, 1902, transmitting evidence of service of notice of said ruling upon the Utah Board of Land Commissioners, August 3, 1902, and reporting no action taken. Said Selection List No. 71 is accordingly hereby canceled as to the said E. ½ N.

E. ¼ of Sec. 9, Tp. 13 S., R. 11 E. and the application of Hulda Sjoberg to amend her C. D. S. 1756 to embrace the E. ½ N. E. ¼, Sec. 9, S. W. ¼ N. W. ¼ and N. W. ¼ S. W. ¼ Sec. 10, Tp. 13 S., R. 11 E. allowed.

2 E-53

Advise parties in interest.

Coal declaratory statement No. 1745 is enclosed to be noted by you in accordance with the foregoing.

Very respectfully, Binges Hermann (?), Commissioner.

WOC. E-54. N. ECF. HGP.

July 19, 1902.

Register and Receiver, Salt Lake City, Utah.

SIRS: I am in receipt of your letters of April 21, April 22, June 12 and June 19, 1902, relative to Utah State List No. 71, Agricultural College, dated April 2, 1902, filed in your office April 3, 1902. Said State selection list conflicted with a number of coal filings and Marcellus Bean and Thomas C. Thompson filed in your office their coal declaratory statements for lots 1 and 8, Sec. 4, E. ½ N. E. ¼ Sec. 9, T. 13 S., R. 11 E., and lots 1, 2, 3, and 4 of Sec. 3, T. 13 S., R. 11 E., which applications you suspended because of conflict with said list 71.

I am now in receipt of your letters of June 12 and 13 transmitting the relinquishment of said Bean and Thompson of the land covered by their attempted coal declaratory statements.

I am also in receipt of applications to amend coal declaratory statement No. 1744 of James A. Bean from the N. W. ¼ of Sec. 10, T. 13 S., R. 11 E., to lots 5 and 6, Sec. 3 [fol. 275] and N. ½ N. W. ¼ Sec. 10, same township and range; the application of Hulda Sjoberb to amend her coal declaratory statement No. 1745 from the N. E. ¼ S. E. ¼ Sec. 9, N. W. ¼ S. W. ¼ and W. ½ N. W. ¼ Sec. 10, T. 13 S., R. 11 E., to include the E. ½ N. E. ¼ Sec. 9, S. W. ¼ N. W. ¼, N. W. ¼ S. W. ¼ Sec. 10, T. 13 S., R. 11 E.; the applications of Pancha K. Gilson to amend her coal declaratory statement No. 1738 from lots 6 and 7, Sec. 3 and

W. ½ N. E. ¼ Sec. 10, T. 13 S., R. 11 E. to lot 7 of Sec. 3, W. ½ N. E. ¼ and N. W. ½ S. E. ¼ Sec. 10, T. 13 S., R. 11 E.; and of James Milner to amend his coal declaratory statement No. 1737 from the S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼ N. W. ¼ S. E. ¼ and N. E. ¼ S. W. ¼ Sec. 9, T. 13 S., R. 11 E. to include S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼ and N. ½ S. E. ¼ Sec. 9, T. 13 S., R. 11 E.; also application to purchase the S. W. ¼ N. W. ¼ of Sec. 10, T. 13 S., R. 11 E., under the coal land law by Goldie F. Bean. The applications to amend, it is stated, are desired in order that applicants may secure the lands upon which their improvements are situate; that the errors in the descriptions contained in their original declaratory statements were caused by misapprehension as to location of the lands and that they have since had surveys made of the lands claimed by them and find same to be described as in their applications to amend. They further state that the land to which they desire to amend is of the character contemplated by the coal-land laws, and, in addition to this securing the ground claimed by them, the amendments will avoid litigations in that it will relieve them from conflicts with other coal declaratory statements or with selections list No. 71 of the State of Utah. The said declarants further state that they have not sold or assigned their original filings. The applications to amend are also accompanied by affidavits

relative to the character of the land and by your recommendation that the applications be allowed, that a hearing be ordered as between James A. Bean and the State of Utah, and that the papers in the case of Coal D. S. 1756 of George McCall, conflicting with the application of Goldie F. Bean, above mentioned, be considered and returned to your office with such instructions as may be deemed necessary.

The application to amend of James A. Bean conflicts with list 71 of the State of Utah, but on June 19, 1902, you forwarded a relinquishment duly executed by the Secretary of the State Board of Land Commissioners relinquishing said S. W. ¼ S. W. ¼ Sec. 3, T. 13 S., R. 11 E. Selection list No. 71 of the State of Utah is therefore hereby canceled to the extent of the tract last above described, thus removing the

[fol. 276] conflict with coal declaratory statement application of James A. Bean.

In view of the accompanying statements and of your recommendation, the applications to amend the filings of James A. Bean, John Milner and Pancha K. Gilson are hereby granted. The papers pertaining to said applications and to the application to purchase of Goldie F. Bean and Coal Declaratory Statements of George McCall are herewith returned to your office for appropriate action under the coal-land law and regulations.

The application to amend of Hulda Sjoberg is found to conflict as to the E. ½ of N. E. ¼ of Sec. 9, T. 13 S. R. 11 E., with the said State list No. 71. In view of the fact that said

4 E-57

land is alleged by declarant to be coal land of the further fact that same was returned as coal land by the official survey thereof, you will advise the State of Utah that it will be allowed sixty days from notice to show cause, if any there be, why said selection list should not be canceled as to the said E. ½ of N. E. ¼ of Sec. 9, and the application to amend of Hulda Sjoberg allowed.

Very respectfully, Binges Hermann, Commissioner.

Law Offices Wm. T. S. Curtis, Bond Building, 14th St. and N. Y. Ave., Rooms 626-7-8-9

Telephone 1562-4 Main

Washington, D. C., July 9, 1902.

Hon. Commissioner of the General Land Office, Washington, D. C.

SIR: In the matter of List No. 71 for Agricultural College selection, Salt Lake City, Utah, in conflict with the coal entry of Bean and Thompson (101, 639—1902), I beg to request that the matter be taken up at once, and closed out, in view of the fact that all conflicting interests have been settled.

I am advised that the State has relinquished its interest in the S. W. ¼ of S. W. ¼ of Section 3, and the various parties have filed their applications to amend their filings.

[fol. 277] Your early and favorable action is respectfully requested, and also that I may be notified of any and all action.

Very respectfully, Wm. T. S. Curtis.

DWN. 173—52. E-60.

U. S. General Land Office, Received Jul. 11, 1902

116,144

Wm. T. S. Curtis, Bond Bldg., City, July 9, 1902, asks early and favorable action List 71 in conflict with Coal Entry of Bean and Thompson.

(?) Asked July 11/02.

Nov. 6, 1902, Refd. to Div. G.—ECF.

ECF. JR. HGP.

NG. 93/328. E-61.

Department of the Interior, United States Land Office

Place: Salt Lake City, Utah,

Date: Feb, 9, 1910.

Salt Lake 04085. Election-Act Mar. 3/09. State List No. 71, Agric. College. 2 Encls. CFS.

Hon. Commissioner General Land Office, Washington, D. C.

Sir: I have the honor to transmit herewith the election of the State of Utah to take patent exclusive of coal in the matter of State Selection List No. 71, Agricultural College, Serial No. 04085, for the N. W. ¼ S. W. ¼, N. ½ N. E. ¼, N. ½, N. W. ¼ S. W. ¼ N. W. ¼, S. E. ¼ N. E. ¼, Sec. 8, S. W. ¼ N. W. ¼, N. ½ N. W. ¼, N. W. ¼ N. E. ¼, Sec. 9, Lot 4, S. W. ¼ S. W. ¼, Sec. 3, and all Sections 4, 5, and 6, T. 13 S., R. 11 E., S. L. M., together with authorization of Secretary to act.

[fol. 278] The same is transmitted for such action as is deemed necessary and proper in the pr-mises.

Very respectfully, E. W. Simpson, Register.

Rubber Stamp: Received Feb. 14, 1910. 0498.

EB—8 1910 E-62

Serial No. 04085

State School A. C. List No. 71

On motion of Commissioner Thain the following resolution was unanimously adopted.

"Resolved that W. H. Farnsworth the Secretary of this Board be and he is hereby authorized to sign on behalf of the State Board of Land Commissioners any and all papers necessary to reserve to the United States all coal in Land selected by the State which subsequent to selection have been classified, claimed, or reported as being valuable for coal, and the election by the State to receive patents for said lands, reserving to the United States all coal therein, according to an act of Congress entitled:

"An Act for the protection of the surface rights of entrymen." (Public No. 323.)

And he is hereby also authorized to sign all necessary papers regarding the classification and valuation of Coal Lands, or the reclassification of said lands as may be required under circular 13 of the United States General Land Office, Approved April 10, 1909, or any other rules which may be made by the United States General Land Office regarding said matter."

* * * * * * *

I hereby certify that the foregoing is a full, true and correct copy of a resolution passed by the State Board of Land Commissioners, for the State of Utah on April 21, 1909, as copied from the minutes of a meeting of said board held on the 21st day of April, 1909.

As witness my hand at Salt Lake City, Utah, Feby 3rd 1910.

W. H. Farnsworth, Secretary State Board of Land commissioners.

Subscribed and sworn to before me this 3rd day of Feby., A. D. 1909.10. O. O. Eldridge, Notary Public.

04085. E-63

4-357

Serial No. 04085

[fol. 279] (Form Approved by the First Assistant Secretary of the Interior Sept. 20, 1909)

Department of the Interior

Notice of Right of Election in Cases Where Final Proof Has Not Been Submitted

(Act of March 3, 1909)

U. S. Land Office, Salt Lake City

No. —

State Board Land Com., City

Sir: Your attention is directed to the provisions of the Act of March 3, 1909, printed on the back hereof, and you are hereby notified that subsequently to your State Selection Agricultural College No. 71, made April 3, 1902, for All Sec. 4-5 and 6; N. W. ¼ S. W. ¼; N. 2 N. E. ¼; N. 2 N. W. 4; S. W. 4 N. W. 4; S. E. N. E. 4 Sec. 8; S. W. ½ N. W. 4; N. 2 N. W. 4; N. W. 4 N. E. 4 Sec 9; Lot 4; S. W. 4 S. W. 4, Section 3, Township 13 S., Range 11 E., Salt Lake Meridian, said tract was classified, claimed, or reported as being valuable for coal; also that at the time of applying for notice to submit final proof you must state in writing whether you elect to receive a patent which shall contain a reservation to the United States of all coal in said land, and the right of the United States, or any person, or persons authorized by it, to prospect for, mine, and remove coal from the same, in accordance with the conditions and limitations imposed by said act. Should you elect to receive such patent, no further inquiry will be made, respecting the coal character of the land, and patent will issue, with the statutory reservation, provided satisfactory proof of your good faith and of compliance on your part with the provisions of the law under which you claim, be submitted. In the event you decline to elect to receive such patent, evidence will be received at the

time of making final proof with a view to determining whether the land in chiefly valuable for coal, and, the proof being in other respects regular and satisfactory, you will be entitled to receive patent without reservation unless at the time of the hearing on final proof it shall be shown that the land is chiefly valuable for coal.

Respectfully, —— ——, Register. —— —— Receiver.

[fol. 280] Election to Receive Patent upon Non-mineral Claim Exclusive of Any Deposits of Coal in the Land

STATE OF UTAH,
County of Salt Lake, ss:

I, W. H. Farnsworth, Secy. State Board Land Com., town of Salt Lake, County of Salt ——, State of Utah, who on April 3, 1902, made State Selection A. C. 71 (Insert Kind of location, selection, or entry), No. List 71 A. C.,

E. 64. Ex. 5. 04085

for the Sess. 4, 5, and 6; N. W. 4 S. W. 4; N. 2 N. W. 4; N. 2 N. W. 4; S. W. 4 N. W. 4; S. E. 4 N. E. 4 Sec. 8, S. W. 4 N. W. 4; N. 2 N. W. 4; N. W. 4 N. E. 4 of Sec. 9 and Lot 4; S. W. 4 S. W. 4, Section 3, Township 13 S., Range 11E., S. L. Me Meridian, being duly sworn, do hereby Elect, upon submission of satisfactory proof of compliance with law under which my claim was initiated, to receive patent for the lands, which patent shall reserve to the United States all of the coal in said lands with the right of the United States, or any person authorized by it, to prospect for, mine and remove the coal from same in accordance with the conditions and limitations of the Act of March 3, 1909 (35 Stat., 844)..

In accordance with above election, I hereby authorize the proper officer or officers of the United States, upon submission of satisfactory final proof upon my location, selection, or entry, to issue final certificate or other paper as basis for patent, containing the reservation of the coal hereinbefore described, and to issue patent in accordance therewith.

W. H. Farnsworth, Secy. State Board Land Com.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that

said affidavit was duly subscribed and sworn to before me at my office in Salt Lake City, this 3rd day of January, 1910.

O. P. Eldridge, Notary Public.

NOTE 1.—This affidavit of election may be executed before any officer authorized to administer oaths and possessed of a seal.

NOTE 2.—The attention of parties in interest is directed to [fol. 281] the provisions of the Act of March 3, 1909, a copy of which is printed below.

(35 Stat., 844)

An Act for the Protection of the Surface Rights of Entrymen

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered upon the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon said conditions as to securing for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction; Provided, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit; Provided further, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and sat-

isfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved March 3, 1909.

Postmark of delivery office.

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

[fol. 282] Date of Delivery.

Post Office, Salt Lake City, Utah. Official Business.

Penalty for private use to avoid payment of postage, $300.

Return to: Name of Sender: —— ——; Street and Number or Postoffice Box: ——.

E. 66

Salt Lake City, Utah

Registry Return Receipt

May 17, 1909, received from the Postmaster at (delivering office:) —— registered (letter—parcel) No. — from Post Office at Salt Lake City, Utah, addressed to (name of addresses:) —— ——.

Date: —— —, 190—.

Date of delivery: —— —, ——. (Signature of name of addressee:) —— ——. (Signature of addressee's agent:) —— ——.

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

A Registered article must not be delivered to anyone but the addressee, except upon addressee's written order.

When the above receipt has been properly signed, it must be postmarked with the name of delivering office and actual date of delivery and mailed to its address, without envelope or postage. O. P. E

[fol. 283] E. 67

Department of the Interior, United States Land Office

(Place): Salt Lake City, Utah, (Date): Sept. 5, 1909.

Salt Lake 04085 reports no action and transmits evidence of service.

1 Enc. CFS.

Hon. Commissioner General Land Office, Washington, D. C.

SIR: I have the honor to report that on May 17, 1909, the State of Utah, who made State Selection List 71, Agricultural College, Serial No. 04085, on Apr. 7, 1902, for Lot 4, Sec. 3; all secs. 4, 5, & 6; N. W. ¼ S. W. ¼, N. ½ N. E. ¼, N. ½ N. W. ¼, S. W. ¼ N. W. ¼, S. E. ¼ N. E. ¼, Sec. 8; S. W. ¼ N. W. ¼ N. ½ N. W. ¼, N. W. ¼ N. E. ¼, Sec. 9, T. 13 S., R. 11 E., S. L. M., among other lands was notified by registered letter, addressed to State Board Land Commissioners, Salt Lake City, Utah, that it would be allowed sixty days from notice within which to file in this office its election to take patent for the land exclusive of the coal deposits contained therein, or to file a denial that the land contained coal of workable value and request a hearing to determine that question. No action of any kind has been taken in response to such notice. Evidence of service of notice is transmitted herewith,

Very respectfully, E. W. Thompson (?)

04084 blue ? ? ? to P.

Register.

Rubber Stamp: Received Sept. 20, 1909, C. L. O. E-68 08-1712224.

[fol. 284] 10/27

Department of the Interior, Special Service Division, General Land Office

—— 11/20, 1908.

Chief of Division C:.

Please cause to be noted on tract books opposite ——, Sec. —, T. —, R. —, — Mer., —— land district, S. 2 Sec. 1; All 11 & 12; E. 2 S. E. 4, E. 2 N. E. 4, S. 2 4; S. 2 5;

E 2 6; N. W. 4 S. W. 4, N. 2 N. E. 4, N. 2 N. W. 4; S. W. 4 N. W. 4 & S. E. 4 N. E. 4 9; S. W. 4, N. W. 4, N. 4 N. W. 4 & N. W. 4 N. E. 4 9-13 S. 11 E. S. L. Mer. Utah Agri. Col. List 71. Protest in P 08-171224 entry of record.

H. G. B.

(If entry of record, annotation not necessary.)
Noted Nov. 21, 1908. J. A. S., — Div. C.
Return this card for filing with —.

5/7/14.

Closed in favor of State coal election have been filed by the State clerk. 04085. A. C. B. F. S. Noted 10/29, 1914. VauD (?) Div.

E-70

Department of the Interior, United States Land Office

Salt Lake 04095 State Sel. Agricultural Col. List 71. Election Act. Mar. 3/09.
1 Enc. CFS.

Salt Lake City, Utah, July 9, 1909.

Hon. Commissioner General Land Office, Washington, D. C.

SIR: I have the honor to transmit herewith the election of the State of Utah to take patent exclusive of coal in the [fol. 285] matter of State Selection, Agricultural College, List 71. Serial No. 04085, for the sections 1, 11, and 12, and E. ½ S. E. ¼ E. ½ N. E. ¼, Sec. 10, T. 13 S., R. 11 E., S. L. M.

The same is transmittel for such action as is deemed necessary and proper in the premises.

Very respectfully, Ed. W. Thompson, (?) Register.

List 71-Div. P. Withdrawn 2-14-08.
Rubber Stamp: Received July 1, 1909, G. L. O. 27746. 08.

Serial No. 04085

(Form Approved by the Secretary of the Interior March 25, 1909)

Department of the Interior

Notice of Right of Election (Act of March 3, 1909)

No. —

U. S. Land Office, Salt Lake City, Utah.

June 22, 1909.

SIR: Your attention is directed to the provisions of the Act of March 3, 1909, on the back hereof, and you are hereby allowed sixty days from notice within which to file in this office your election to take patent for the land embraced in your selection, Agricultural College, Number 71, made April 3, 1909, for Sections 1-11-12 S. E. 2 S. E. 4-E 2. N. E. 4, Section 10, Township 13 S., Range 11 E., S. L. Meridian, such patent to reserve to the United States all coal in the lands with the right of the United States, or persons authorized by it, to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of said act; or to deny the existence of known deposits of valuable coal upon the land at date of final proof and entry, in which event you must file in this office within the time prescribed, evidence in the form of affidavit statements by persons familiar with the lands, preferably mineral experts of practical miners, alleging the lands to be non-coal in character, with the reason therefor. If you fail to within sixty days from receipt of this notice file your [fol. 286] said election, or to deny the existence of known deposits of valuable coal in the land, patent will issue on submission of final proof satisfactory in other respects, reserving to the United States all the coal in the land.

Respectfully, —— ——, Register. —— ——, Receiver.

Election to Receive Patent upon Non-mineral Claim Exclusive of Any Deposits of Coal in the Land

STATE OF UTAH,
County of Salt Lake, ss:

I, W. H. Farnsworth, Secretary State Board Land Commissioners, of the town of Salt Lake City, County of Salt Lake, State of Utah, who on April 3, 1909, made selection, No. 71, for the Sections 1-11-12 & E. 2 S. E. 4, E. 2 N. E. 4, Section 10, Township 13 S., Range 11 E., S. L. Meridian, being duly sworn, do hereby elect, upon submission of satisfactory proof of compliance with law under which my claim was initiated, to receive patent to the lands, which patent shall reserve to the United States all of the coal in said lands with the right of the United States, or any person authorized by it, to prospect for, mine, and remove the coal from same in accordance with the conditions and limitations of the Act of March 3, 1909, Public No. 323.

In accordance with above election I hereby authorize the proper officer or officers of the United States, upon submission of satisfactory final proof upon my location, selection or entry, to issue final certificate or other paper as basis for patents, containing the reservation of the coal hereinbefore described, and to issue patent in accordance therewith.

W. H. Farnsworth, Secretary State Board Land Commissioners.

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known or has been satisfactorily identified before me by personally known ——, and that said affidavit was duly subscribed and sworn to before me at my office in Salt Lake City, Utah, this 3rd day of July, 1909.

O. P. Eldridge, Official Designation of Officer: Notary Public.

[fol. 287] NOTE 1.—This affidavit of election may be executed before any officer authorized to administer oaths and possessed of a seal.

NOTE 2.—The attention of parties in interest is directed to the provisions of the Act of March 3, 1909, copy of which is printed below.

(Public—No. 323.) (H. R. 24834)

An Act for the Protection of the Surface Rights of Entrymen

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: Provided, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: Provided further, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Approved March 3, 1909.
6-1531.

[fol. 288] Plaintiff's Exhibit 6 was introduced and read in evidence as follows:

GOV'T EXHIBIT 6

"B." KRT

United States Department of the Interior, General Land Office, Washington

March 20, 1929.

I hereby certify that the annexed copies of selection list No. 75 and letter, are true and literal exemplifications of the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

D. K. Parrott, Acting Assistant Commissioner of the General Land Office. (Government Seal of the United States General Land Office.)

(26)

State Board of Land Commissioners, Salt Lake City, Utah

March 18, 1903.

I, Byron Groo, Secretary of the State Board of Land Commissioners of the State of Utah, hereby certify that Heber F. Wells and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the State of Utah.

Byron Groo, Secretary State Board of Land Commissioners.

List No. 75, Agricultural College

List of Lands Selected by State of Utah

The undersigned, the duly authorized agents of the State Board of Land Commissioners of the State of Utah, under land by virtue of the Act of Congress, entitled (An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States), approved July 16, 1894, and under and in pursuance of the rules and regulations pre- [fol. 289] scribed by the Commissioner of the General Land Office, hereby make and file the following list of selections

of the surveyed, unappropriated, unreserved, non-mineral public land of the United States lying within the State of Utah, said lands being selected and to be applied under Section 8 of said Act for Congress "for the use of an Agricultural College."

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Ex. 6. 02-2.

Utah State List No. 75, Agricultural College, March ——, ——, ——.

Part of section	Sec.	Township	Range	Area Acres	Area Fraction	
E. ½ S. E. ¼	31	36 S.	13 W.	80	Mineral Ret.	71
Lots 3, 4, 5, 6, & 7	6	37 S.	13 W.	202	60	74
S. E. ¼ N. W. ¼	6	37 S.	13 W.	40		"
E. ½ S. W. ¼	6	37 S.	13 W.	80		"
Lot 2	6	37 S.	13 W.	40	Mineral	"
S. W. ¼ N. E. ¼	6	37 S.	13 W.	40		"
W. ½ S. E. ¼	6	37 S.	13 W.	80		—74
E. ½ S. E. ¼	1	37 S.	14 W.	80	Mineral Ret.	—193
S. E. ¼ N. E. ¼	1	37 S.	14 W.	40		"
Lots 1, 2, & 3	9	15 S.	14 E.	122	02 20	171
S. ½ N. E. ¼	9	15 S.	14 E.	80	Mineral	"
S. E. ¼ N. W. ¼	9	15 S.	14 E.	40		"
E. ½ S. W. ¼	9	15 S.	14 E.	80		"
S. E. ¼	9	15 S.	14 E.	160		"
All	10	15 S.	14 E.	642	96	172
W. ½	15	15 S.	14 E.	320		173
N. ½ N. E. ¼	15	15 S.	14 E.	80		"
All	5	13 S.	10 E.	642	88 18—	146
Lots 1, 2, & 3	8	13 S.	10 E.	119	71 Mineral (Coal)	"
S. ½ N. E. ¼	8	13 S.	10 E.	80	Return	"
S. ½ N. W. ¼	8	13 S.	10 E.	80		146
N. ½ S. E. ¼	8	13 S.	10 E.	80		"
N. ½ S. W. ¼	8	13 S.	10 E.	80		"
W. ½ S. E. ¼	17	3 N.	20 E.	80		210
E. ½ S. W. ¼	17	3 N.	20 E.	80		"
[Vol. 290] N. E. ½	30	10 N.	1 W.	160		118
N. ½ S. E. ¼	30	10 N.	1 W.	80	Mineral	"
S. W. ¼ S. E. ¼	30	10 N.	1 W.	40		"
N. E. ¼ N. W. ¼	30	10 N.	1 W.	40	Mineral Return	"
S. E. ¼ S. W. ¼	30	10 N.	1 W.	40		"
Lots 1, 2, 3, 4, 5, 6, 7, 8, & 9	30	10 N.	1 W.	209	43	"
All	1	13 S.	10 E.	641	88 18—	145
All	3	13 S.	10 E.	642	36 Mineral	"
N. ½	10	13 S.	10 E.	320		148
N. ½	11	13 S.	10 E.	320		"
N. ½	12	13 S.	10 E.	320		"
				6263	44	
Change in Area					40	
				6263	84	

No. 6-37-13
Lots 3— 40.00
4— 40.72
5— 40.38
6— 40.62
7— 42.—?

202.60 See Plat. (?)

Remarks

March 30, 1903, notice for publication issued to the Iron County Record of Cedar City, Utah, setting June 15, 1903, for hearing at 10 a. m., at this office, consolidated with notice in List No. 74. Agricultural College, and delivered to State Board of Land Commissioners personally.

March 30, 1903, notice for publication issued to the Iron County Record of Cedar City, Utah, consolidated with List No. 74, Agricultural College, and delivered to the State Board of Land Commissioners personally.

Same as first marginal notation.

March 30, 1903, notice for publication issued to the Eastern Utah Advocate of Price, Utah, and delivered to the State Board of Land Commissioners personally (consolidated with tracts in T. 13 S., R. 10 E., this list).

[fol. 291] Ordered as to lot 3, S. E. 4 N. W. 4, E. 2 S. W. 4, N. 2 N. E. 4 W. 2 S. E. 4, C. A. H. Aug. 10, 1904, to R. & R. dismissing protest and closing case C. A. H.

March 30, 1903, notice for publication issued to the Eastern Utah Advocate of Price, Utah setting June 15, 1903, for hearing, at 10 a. m., at this office and delivered to the State Board of Land Commissioners personally.

March 30, 1903, notice for publication issued to the Box Elder Report of Brigham City, Utah and delivered to the State Board of Land Commissioners personally.

March 30, 1903, notice for publication issued to the Box Elder Report of Brigham City, Utah, setting hearing for June 15, 1903, of Land Commissioners personally.

Same as marginal notation No. 4.

Nov. 5, 1904, to R. & R. ordering hearing C. A. H. Letter of Nov. 5, 1904, recalled by letter N of Nov. 16, 1904, insofar as it related to these tracts C. A. H.

STATE OF UTAH,
County of Salt Lake, ss:

We, Heber M. Wells and Byron Groo, authorized agents of the State Board of Land Commissioners of the State of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under Section 8 of an Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted mineral nor reserved lands, and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by agents and employes of the State as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to our knowledge, any placer, cement, gravel or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said [fol. 292] land is essentially non-mineral land, and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral lands, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof. That the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named. That the land contains no salt spring, or deposits of salt in any form sufficient to render it valuable therefor.

Heber M. Wells, Byron Groo, Agents for the State Board of Land Commissioners.

Subscribed and sworn to before me this 18th day of March, 1903. Ellridge L. Thomas, Notary Public.

United States Land Office, Salt Lake City, Utah

March 30, 1903.

We hereby certify that we have carefully and critically examined the foregoing list of lands selected by the State of Utah under the grant to it by the Act of Congress, entitled "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894, and we have tested the accuracy of said list by the plats and records in the office, and we find the same to be correct; and we further testify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor is any part thereof, returned and denominated as mineral lands or land, nor claimed as swamp land; neither are there any homesteads, pre-emptions nor other valid claim to any portion of said land on file or record in this office. We further certify that the foregoing list shows an assessment of the fees payable to us, and that the said State of Utah has paid to the undersigned, the receiver, the full sum of — Dollars in full payment and discharge of said fees.

Frank D. Hobbs, Register U. S. Land Office, Salt Lake City, Utah. Geo. A. Smith, Receiver U. S. Land Office, Salt Lake City, Utah.

[fol. 293] 5/332. Finished ?? 32 plff. Grant: Agricul- 6363.44
tural College. No. of List: 75. 8. No. of Acres: 6343.44.
Ex. 6, plff. J. W. C.
Utah Land District.
Received and filed March 24, 1903.
Approved March 30, 1903. 190-.
Deseret News.
Posted June 5, 1903. W. S. T.
See appearance of Horace F. Clark.
156684—1903 C??
April 20, 1904, to R. & R. C. A. H.
Aug. 10, 1904, to R. & R. dismissing protest against parts of Sec. (?)
T. 15 S. R. 14 E.
Aug. 10, 1904, Refd. to Div. "G." C. A. H.

Appd. List 10, Dec. 1, 1904.
1903. 60131-1.

02-4

Horace F. Clark, Land, Mining and Patent Attorney, Rooms 26 to 30 Baltic Building, Washington, D. C.

Dictated. Division "G." State of Utah Selections. List 75, Agricultural College.

September 12, 1903.

Honorable Commissioner of the General Land Office.

SIR: In the above entitled list of lands selected by the State of Utah, on account of the grant to the State contained in the Act of July 16, 1894 (28 Stat., 107-110), I hereby enter my appearance on behalf of the State as to the following tracts of land, selected in said list:

Lots 1, 2, and 3: S. ½ of N. E. ¼; S. E. ¼ of N. W. ¼; E. ½ of S. W. ¼ and S. W. ¼ of Sec. 9, T. 15 S., R. 14 E. All of Sec. 10, T. 15 S., R. 14 E., N. ½ of N. E. ¼ Sec. 15 and W. ½ of Sec. 15, T. 15 S., R. 14 E. All of Sec. 5, T. 13 S., R. 10 E. Lots 1, 2 and 3; S. ½ of N. E. ¼; S. ½ of N. [fol. 294] W. ¼; N. ½ of S. E. ¼ and N. ½ of S. W. ¼ Sec. 8, T. 13 S., R. 10 E.

Kindly advise me of all action taken in the premises.

Very respectfully, Horace F. Clark.

Thereupon the plaintiff's Exhibit 7, a copy of selection list No. 32 and the papers therein contained, was offered and read in evidence as follows:

GOV'T EXHIBIT 7

"B." KRT

4-207

United States Department of the Interior, General Land Office, Washington

March 20, 1929.

I hereby certify that the annexed copy of selection list No. 32 is a true and literal exemplification of the original on file in this office.

In Testimony Whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

D. K. Parrott, Acting Assistant Commissioner of the General Land Office. (Government Seal of the United States General Land Office.)

4-610 b. Ex.-7

Note cancellation, press-copy, and return this blank to Division G. 03-1.

Department of the Interior, General Land Office,
Washington, D. C.

May 6, 1901.

To the Bookkeeper;

You are hereby notified that D. S. 11931, Salt Lake Series, covering S. E. 4 N. E. 4; W. 2 N. E. 4 and N. E. 4 N. W. 4, Sec. 22, T. 3 N. R. 2C. has been cancelled as to All — Sec. —, T. —, R. —, by letter "G" dated May 6, 1901. [fol. 295] You will please note such cancellation on the tractbooks at once.

By order of the Commissioner.

J. F. A., Clerk Division G.

Noted May 7, 1901.

E. J. D., Clerk Division C.

State Board of Land Commissioners, Salt Lake City, Utah

December 17th, 1900.

I, Byron Groo, Secretary of the State Board of Land Commissioners of the State of Utah, hereby certify that Heber N. Wells and Byron Groo are the duly appointed agents of said board for the selection of lands under the grants by the United States to the State of Utah.

Byron Groo, Secretary State Board of Land Commissioners.

List No. 32, School of Mines

List of Lands Selected by State of Utah

The undersigned, the duly authorized agents of the State Board of Land Commissioners of the State of Utah, under and by virtue of the Act of Congress, entitled "An Act to

enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," Approved July 16, 1894, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby make and file the following list of selections of the surveyed lands of the United States lying within the State of Utah, said lands being selected and to be applied under Section 12 of said Act of Congress, "for the establishment and maintenance of a School of Mines in connection with the University."

Heber M. Wells, Bryon Groo, Agents for the State Board of Land Commissioners.

[fol. 296] Utah State List No. 32, School of Mines, Dec. 17, 1900

Part of section	Sec.	Township	Range	Area Acres	Area Fraction		
Lot 9	4	43 S.	15 W.	46	41	14	
N. W. ¼ S. E. ¼	23	22 S.	6 W.	23	40		
N. W. ¼ N. E. ¼	33	23 S.	9 W.	25	40		
All	4	22 S.	4 E.	28	143	84	O K See Plat11
All	34	12 S.	11 E.		640		
S. ½	33	12 S.	11 E.		320		
S. ½	35	12 S.	11 E.		320		
E. ½	27	12 S.	11 E.		320		
S. E. ¼	22	12 S.	11 E.		160		
N. W. ¼	22	12 S.	11 E.		160		
Lot 4	5	6 S.	24 E.		7	95	
Lot 1	6	6 S.	24 E.		8	05	
N. W. ¼ N. E. ¼	8	6 S.	24 E.		40		
S. W. ¼ N. W. ¼	35	30 S.	4 W.		40		
N. W. ¼ N. W. ¼	20	14 N.	15 W.		40		Mineral
W. ½ S. E. ¼	6	1 N.	24 E.		80		
S. E. ¼ S. W. ¼	6	1 N.	24 E.		40		
Lot 7	6	1 N.	24 E.		40	30	
S. W. ¼ N. E. ¼	7	1 N.	24 E.		40		
E. ½ N. W. ¼	7	1 N.	24 E.		80		
Lots 1, 2, 3, & 4	7	1 N.	24 E.		160	56	
S. W. ¼ N. E. ¼	23	23 S.	6 W.		40		
E. ½ N. E. ¼	23	3 N.	3 E.		80		
S. ½ N. E. ¼	23	37 S.	11 W.		80		Mineral
S. E. ¼	23	37 S.	11 W.		160		"
E. ½	27	37 S.	11 W.		320		"
S. W. ¼	27	37 S.	11 W.		160		"
S. ½ N. W. ¼	27	37 S.	11 W.		80		"
All	30	37 S.	11 W.		640		"
S. E. ¼ S. E. ¼	23	37 S.	11 W.		40		"
S. ½ S. W. ¼	23	37 S.	11 W.		80		Coal Ret.
S. E. ¼ S. E. ¼	23	37 S.	11 W.		40		Mineral
S. E. ¼	33	37 S.	11 W.		160		"
S. ½ N. E. ¼	33	37 S.	11 W.		80		"
Lots 1 & 2	33	37 S.	11 W.		24	26	"
S. E. ¼ S. W. ¼	34	37 S.	11 W.		40		"
S. ½ S. W. ¼	34	37 S.	11 W.		80		"

[fol. 297]

Part of section	Sec.	Township	Range	Area-s Acres	Fraction
S. W. ¼ N. E. ¼	34	37 S.	11 W.	40	Mineral
Lots 1, 2, 3 &&	34	37 S.	11 W.	48	88*
S. ½ N. W. ¼	35	37 S.	11 W.	80	"
S. ½ N. E. ¼	35	37 S.	11 W.	80	"
Lots 1, 2, 3, & 4	35	37 S.	11 W.	48	"
				5662	17

*se ne, w2 ne, ne nw DS11931
*Less | 9

Ds 11931 canceled May 6, 1901 JFA (1) 5662.08.
Jan. 28-29/96 Wm. G. Brough. Facts checked.
Published 1901-47934 and non-mineral as to S. 2 S. W. 4, Sec. 22—No action taken. Pallock.

Remarks

Notice for publication issued December 24, 1900, for the Inter-Mountain News at Corrine, Utah, and delivered to the State Board (Last line obliterated).

03-4

STATE OF UTAH,
County of Salt Lake, ss:

We, Heber M. Wells and Byron Groo, authorized Agents of the State Board of Land Commissioners of the State of Utah, being first duly sworn, depose and say that the foregoing list of lands, hereby selected, is a correct list of a portion of the public lands selected by the State of Utah, under Section 12 of an Act of Congress, entitled, "An Act to enable the people of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States," approved July 16, 1894; that all of the said lands are vacant, unappropriated, and are not interdicted, mineral nor reserved lands, and are of the character contemplated by the grant in said Act. That we have caused the lands mentioned to be carefully examined by the agents and employes of the State, as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that

there is not within the limits of said land, to our knowledge, any placer, cement, gravel or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for min- [fol. 298] eral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that our application therefore is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and the above and foregoing statements as to the character of said land to each and every subdivision thereto. That the said selection and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose named.

Heber M. Wells, Byron Groo, Agent for the State Board of Land Commissioners.

Subscribed and sworn to before me this 17th day of December, 1900. Ellridge L. Thomas, Notary Public.

Complainant thereupon offered in evidence Exhibits 8 to 12, which are agreements to purchase selected lands by Truth A. Milner and by S. D. Milner, Agent, by Stanley B. Milner, by Truth A. Milner, by Stanley B. Milner, agent, and by Stanley B. Milner, agent for Samuel H. Gilson, to which offer the defendants objected upon the ground of immateriality, incompetency and irrelevancy, which objection was overruled by the court and exception noted.

Plaintiff's Exhibit 8 offered and received in evidence is in words and figures as follows:

Gov't Exhibit 8

"Agreement to Purchase Selected Lands

Ex. 8, Govt.

"County of Salt Lake,
State of Utah, ss:

"Personally appeared before me, a Notary Public in and for Salt Lake County, Utah, Truth A. Milner, by S. B. Milner, Agt., of Salt Lake City, Utah, well known to me, who being first duly sworn according to law, deposes and

says, that he hereby makes application to the State Board of Land Commissioners for the selection by the State of the following described grazing lands (name the class):

No. Acres—320

	Sec.	Tp.	R.	S. L. M.
N. ½	26	12S	11E	

in satisfaction of any grant to the estate.

[fol. 299] "That he is a native born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provisions of the land laws, more than four sections of grazing lands.

Ex. 8, Govt.

Agreement to Purchase Selected Lands

County of Salt Lake,
State of Utah, ss:

"Personally appeared before me, a notary public in and for Salt Lake County, Utah, Truth A. Milner, by S. B. Milner, Agt., of Salt Lake City, Utah, well known to me, who being first duly sworn according to law, deposes and says, that he hereby makes application to the State Board of Land Commissioners, for the selection by the State of the following described grazing lands (name the class):

No. Acres—320

	Sec.	Tp.	R.	S. L. M.
N. ½	26	12S	11E	

in satisfaction of any grant to the State.

"That he is a native born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of

one dollar and 50 cents per acre on ten years time, in accordance with the provisions of the law governing land sales.

"2. The sum of 80 Dollars and — cents, being twenty-five cents per acre for the land embraced in the application, is herewith deposited with the State Board of Land Commissioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the State, shall be determined to have a superior right or claim, [fol. 300] to said land, then in either of said events, the State of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the State a bond conditions that he will pay the full contract price for said land according to the terms of sale.

"5. That the State of Utah by its proper officers, will agree to select said land in satisfaction of any of the government grants to the State in accordance with the laws of Utah, and when so selected and patented to the State, will sell to affiant the same at private sale for one Dollar and 50 cents per acre.

Truth A. Milner, by S. B. Milner, Agent.

"Subscribed and sworn to before me this 17th day of April, 1901. Ellridge L. Thomas, Notary Public, Salt Lake City, Utah. (Seal.)"

Apr. 22, 1901.

"The State of Utah hereby agrees to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of State Board of Land Commissioners,
Byron Groo, Secretary."

STATE OF UTAH,
County of Salt Lake, ss:

April 18, 1901.

S. B. Milner, Agt., being duly sworn according to law, deposes and says that he is the identical person who made

application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits, thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge, any placer, cement, gravel, or other valuable mineral deposit, that no portion of said land is claimed for mining purposes under the local [fol. 301] customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application herefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

S. B. Milner, Agent.

"Subscribed and sworn to before me this 18th day of April, 1901. Ellridge L. Thomas, Notary Public. (Seal.)"

"A true copy. App'd Washington. J. W. C.

Ex. 9, Plff.

Cert. No. 5136. No. 1794

Name: Truth A. Milner, Address: Salt Lake City, Utah.

"Agreement to Purchase Selected Lands

No. of Acres—320. Sec. 26, Tp. 12S, R. 11E.

Filed April 19, 1901. Approved April 22, 1901. Sel'n List No. 67, Agrl. College. Filed in U. S. L. O. April 23, 1901. App. by U. S. L. O. Apr. 29, 1901. Appd. Washington, Dec. 23, 1901. ——, Atty.

Duplicate sent May 4, 1901."

GOVERNMENT'S EXHIBIT No. 9

offered and received in evidence is in words and figures as follows:

"Agreement to Purchase Selected Lands

"COUNTY OF SALT LAKE,
State of Utah, ss:

"Personally appeared before me, a Notary Public in and for Salt Lake County, Utah, Stanley B. Milner, of Salt Lake City, Utah, well known to me, who being first duly sworn according to law, deposes and says, that he hereby [fol. 302] makes application to the State Board of Land Commissioners, for the selection by the State of the following described grazing lands (name of class).

No. Acres, 1920

	Sec.	Tp.	R.	S. L. M.
All	34	12S	11E	
S. 2	33	12S	11E	
S. 2	35	12S	11E	
E. 4	27	12S	11E	
S. E. 4	22	12S	11E	
N. W.	22	12S	11E	

in satisfaction of any grant to the State.

"That he is a "native born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 180 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one Dollar and 50 cents per acre on ten years time, in accordance with the provision of the law governing land sales.

"2. The sum of 480 Dollars and — cents, being twenty-five cents per acre for the land embraced in the application, is herewith deposited with the State Board of Land Commissioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That is the said land shall hereafter be determined to be mineral in character, or if any person other than the State, shall be determined to have a superior right or claim to said land, then, in either of said events, the State of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the State a bond conditions that he will pay the full contract price for said land according to the terms of sale.

"5. That the State of Utah by its proper officers, will agree to select said land in satisfaction of any of the gov- [fol. 303] ernment grants to the State in accordance with the laws of Utah, and when so selected and patented to the State, will sell to affiant the same at private sale, for one Dollars and 50 cents per acre.

Stanley B. Milner.

"Subscribed and sworn to before me this 7th day of December, 1900. D. R. Hammond, Notary Public, Salt Lake City, Utah. My commission expires Aug. 27th, 1901. Dec. 17, 1900. (Seal.)

"The State of Utah hereby agrees to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of the State Board of Land Commissioners.

Byron Groo, Secretary.

"Insert here whether native born or naturalized.

"STATE OF UTAH,
County of Salt Lake, ss:.

December 7th, 1900.

Stanley B. Milner, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard

thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge, any placer, cement, gravel or other valuable mineral deposit, that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but [fol. 304] with the object of securing said land for agricultural purposes.

Stanley B. Milner.

"Subscribed and sworn to before me this 7th day of December, 1900. D. R. Hammond, Notary Public. (Seal.)

"A true copy."

Ex. 9, Plff.

J. W. C. App'd Washington Cert. No. 4588. No. 1594. Name: Stanley B. Milner. Address: Salt Lake City, 509 Auerbach Block Utah. Agreement to Purchase Selected Lands.

No. of Acres, 1,920

	Sec.	Tp.	R.
All	34	12S	11E
S. ½	33	"	"
S. ½	35	"	"
E. ½	27	"	"
S. E. ¼ N. W. ¼	22	"	"

Filed Dec. 10, 1900. Approved Dec. 17, 1900. Sel'n List No. 32, School of Mines. Filed in U. S. L. O. Dec. 19, 1900. Appd. by U. S. L. O. Dec. 24, 1900. Appd. Washington June 22, 1901. ——— ———, Atty.

Duplicate sent Jan. 24, 1901.

GOVERNMENT'S EXHIBIT No. 10

offered and received in evidence is in words and figures as follows:

"Agreement to Purchase Selected Lands

"County of Salt Lake,
State of Utah, ss:

"Personally appeared before me, a Notary Public in and for Salt Lake County, Utah, Truth A. Milner by S. B. Milner, Agent of Salt Lake City, Utah, well known to me, who being first duly sworn according to law deposes and says [fol. 305] that he hereby makes application to the State Board of Land Commissioners, for the selection by the State of the following described grazing lands (name the class).

No. Acres, 2234.56

	Sec.	Tp.	R.	S. L. M.
N. ½	33	12S	11E	320
(S. ½) All Sec. 1—317.52	1	13S	11E	31752
All	12	13S	11E	640
All	11	13S	11E	640
E. ½ S. E. ¼-E. ½ N. E. ¼ Lot 2—39.02	10	13S	11E	160
E. ½ S. E. ¼-N. W. ¼ S. E. ¼-N. E. ¼ S. W. ¼ Lot 3—39.02	3	13S	11E	157044
Lot 1—39.00 S. E. ¼ S. E. ¼				2234.56

in satisfaction to any grant sent to the State.

"That he is a "native born citizen of the United Stat over the age of 21 years, and that he has not purchased from the State of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected to the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase at private sale at the rate of one Dollar and 50 cents per acre on ten years time, in accordance with the provisions of the law governing land sales.

"2. The sum of $558 Dollars and 64 cents, being twenty-five cents per acre for the land embraced in the application, is herewith deposited with the State Board of Land Commissioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the

State, shall be determined to have a superior right or claim to said land, then in either of said events, the State of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the State a bond conditions that he [fol. 306] will pay the full contract price for said land according to the terms of sale.

"5. That the State of Utah by its proper officers, will agree to select said land in satisfaction of any of the government grants to the State in accordance with the laws of Utah, and when so selected and patented to the State, will sell to affiant the same at private sale, for one Dollars and 50 cents per acre.

Truth A. Milner, by S. B. Milner, Agent.

"Subscribed and sworn to before me this 29th day of March, 1902. Ellridge L. Thomas, Notary Public. (Seal.)

Salt Lake City, Utah, April 2, 1902.

"The State of Utah hereby agree to the foregoing conditions, and the order for said selection is hereby made and approved.

"By order of State Board of Land Commissioners.

"Byron Groo, Secretary.

"Insert here whether native born or naturalized.

"STATE OF UTAH,
County of Salt Lake, ss:

March 22, 1902.

S. B. Milner, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place

bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge, any placer, cement, gravel, gilsonite, elaterite, asphaltum, or other valuable mineral deposit, that the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of [fol. 307] the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral lands, but with the object of securing said land for agricultural purposes.

S. B. Milner.

"Subscribed and sworn to before me this 29th day of March, 1902. Ellridge L. Thomas, Notary Public. (Seal.)

"A true copy.

N. ½-Sec. 33-12S-11E. Lots 1-2-3-S. E. ¼ S. E. ¼-Sec. 3-13S-11E. 477.04 A. Cert. No. — July 9, 1903. App'd Washington. 7174.

Cert No. —.

Ex. 10 Plff. J. W. C. No. 2461.

Name: Truth A. Milner. Address: Salt Lake City, Utah.

Agreement to Purchase Selected Lands

No. of Acres, 2,234.56

	Sec.	Tp.	R.
N. ½	33	12S	11E
All	1	13S	11E
All	12	"	"
All	11	"	"
E. ½ S. E. ¼-E. ½ N. E. ¼	10	"	"
Lots 1-2-3-S. E. ¼ S. E. ¼	3	"	"

Filed Mar. 31, 1902. Approved Apr. 2, 1902. Sel'n List No. 71, Agrl. College. Filed in U. S. L. O. Apr. 3, 1902. Appd. by U. S. L. O. Apr. 7, 1902. Appd. Washington July 9, 1903. N1 Sec. 33-12S-11E.

Lots 1-2-3-S. E. ¼ S. E. ¼-Sec. 3-13S-11E. 477.04.

—— ——, Atty.

Duplicate sent Apr. 11, 1902."

[fol. 308] GOVERNMENT'S EXHIBIT No. 11,

offered and received in evidence, is in words and figures as follows:

"Agreement to Purchase Selected Lands

"COUNTY OF SALT LAKE,
State of Utah, ss:

"Personally appeared before me, a Notary Public in and for Salt Lake County, Utah, Harley O. Milner, of Salt Lake City, Utah, well known to me, who being first duly sworn according to law, deposes and says, that he hereby makes application to the State Board of Land Commissioners, for the selection by the State of the following described grazing lands (name the class):

No. of Acres, 2,244.24

641.88. 40.12. S. L. N.

	Sec.	Tp.	R.
All Lot 1-2-3-4	1	13S	10E
All Lot 1-2-3-4	5	"	"
N. ½	10	"	"
N. ½	11	"	"
N. ½	12	"	"

in satisfaction of any grant to the State.

"That he is a "native born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 160 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one dollar and 50 cents per acre on ten years' time, in accordance with the provisions of the law governing land sales.

"2. The sum of 561 Dollars and 56 cents, being twenty-five cents per acre for the land embraced in the application, is herewith deposited with the State Board of Land Commissioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the State, shall be determined to have a superior right or claim to said land, then, in either of said events, the State of [fol. 309] Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the State a bond conditions that he will pay the full contract price for said land according to the terms of sale.

"5. That the State of Utah by its proper officers, will agree to select said land in satisfaction of any of the government grants to the State in accordance with the laws of Utah, and when so selected and patented to the State, will sell to affiant the same at private sale, for one Dollar and 50 cents per acre.

S. B. Milner, Agent.

"Subscribed and sworn to before me this 17 day of March, 1903. Ellridge L. Thomas, Notary Public. (Seal.)

Salt Lake City, Utah, Mar. 19, 1903.

"The State of Utah hereby agrees to the foregoing conditions, and the order of said selection is hereby made and approved.

"By order of State Board of Land Commissioners.

Byron Groo, Secretary.

"Insert.

"STATE OF UTAH,
County of Salt Lake, ss:

March —, 1903.

S. B. Milner, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard

thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge, any placer, cement, gravel, gilsonite, elaterite, asphaltum, or other valuable mineral deposit, that the land contains no salt springs, or deposits of salt in any [fol. 310] form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

S. B. Milner.

"Subscribed and sworn to before me this 17 day of Mar., 1903. Ellridge L. Thomas, Notary Public. (Seal.)

"A true copy. Appr'd Washington.

J. W. C.

Ex. 11, Plff. Cert. No. 8042. No. 3034. Name: Harley O. Milner. Address: Salt Lake City, Utah.

Agreement to Purchase Selected Lands

No. of Acres, 2,244.24

	Sec.	Tp.	R.
All	1	138	10 E
All	3	"	"
N. ½	10	"	"
N. ½	11	"	"
N. ½	12	"	"

Filed Mar. 17, 1903. Approved Mar. 19, 1903. Sel'n List No. 75, Agrl. College. Filed in U. S. L. O. Mar. 24, 1903. Appd. by U. S. L. O. Mar. 30, 1903. Appd. Washington May 9, 1904.

——— ———, Atty.

Duplicate sent Apr. 3, 1903."

[fol. 311] GOVERNMENT'S EXHIBIT No. 12

offered and received in evidence, is in words and figures as follows:

"Agreement to Purchase Selected Lands

Ex. 12, Govt.

"COUNTY OF SALT LAKE,
State of Utah, ss:

"Personally appeared before me, a Notary Public in and for Salt Lake County, Utah, Samuel H. Gilson, Agent, of Salt Lake City, Utah, well known to me, who being first duly sworn according to law, deposes and says, that he hereby makes application to the State Board of Land Commissioners, for the selection by the State of the following described grazing lands (name the class):

No. Acres, 763

	Sec.	Tp.	R.	S. L. M.
S. E. ¼	12	13S	10E	"
S. E. ¼	11	"	"	"
S. ½ of N. E. ¼	14	"	"	"
Lot 1 N. E. ¼ N. W. ¼, N. E. ¼ N. ½ S. E. ¼ & S. E. ¼ S. E. ¼	7	"	11E	"

in satisfaction of any grant to the State.

"That he is a "native born citizen of the United States, over the age of 21 years, and that he has not purchased from the State of Utah, under the provisions of the land laws, more than four sections of grazing lands, or 320 acres of arid lands, or 180 acres of any other one class not named, together with the land now applied for; that he hereby agrees to purchase said land upon the following conditions:

"1. That after said lands shall have been selected by the State of Utah and a patent therefor has been issued to the State by the authorized officers of the United States, affiant will purchase the land at private sale at the rate of one Dollars and 50 cents per acre on ten years' time, in accordance with the provisions of the law governing land sales.

"2. The sum of 190 Dollars and 75 cents, being twenty-five cents per acre for the land embraced in the application, is herewith deposited with the State Board of Land Com-

missioners to be applied as first payment on such land after the same shall have been patented to the State.

"3. That if the said land shall hereafter be determined to be mineral in character, or if any person other than the [fol. 312] State, shall be determined to have a superior right or claim to said land, then, in either of said events, the State of Utah shall be released from all obligations under this agreement.

"4. That he will not remove any timber from said land until he has executed to the State a bond conditions that he will pay the full contract price for said land according to the terms of sale.

"5. That the State of Utah by its proper officers, will agree to select said land in satisfaction of any of the government grants to the State in accordance with the laws of Utah, and when so selected and patented to the State, will sell to affiant the same at private sale, for one Dollars and 50 cents per acre.

Samuel H. Gilson.

"Subscribed and sworn to before me this 11th day of September, 1903. Ellridge L. Thomas, Notary Public. (Seal.)

Salt Lake City, Utah, Sep. 15, 1903.

"The State of Utah hereby agrees to the foregoing conditions, and the order of said selection is hereby made and approved.

"By order of State Board of Land Commissioners.

"Byron Groo, Secretary.

"STATE OF UTAH,
County of Salt Lake, ss:

September 11th, 1903.

Samuel H. Gilson, being duly sworn according to law, deposes and says that he is the identical person who made application to select the land described in the agreement, of which this is a part, and who proposes to purchase the said land from the State of Utah; that he is well acquainted with the character of said described land, and with *and* every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with

regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge, any placer, cement, gravel, gilsonite, elaterite, asphaltum, or other valuable mineral [fol. 313] deposit, that the land contains no salt springs, or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes.

Samuel H. Gilson.

"Subscribed and sworn to before me this 11th day of September, 1903. Ellridge L. Thomas, Notary Public. (Seal.)

A true copy.

"All except S. E. ¼ Sec. 11-138-10E App'd Washington, Dec. 1, 1904. Cert. No. 9564. Ex. 12, Plff.

J. W. C.

No. 3374

Name: Samuel H. Gilson, Agent. Address: Salt Lake City, Utah.

Agreement to Purchase Selected Lands

No. of Acres 763

	Sec.	Tp.	R.
S. E.	11	13S	10E
S. E.	12	"	"
E. ½ N. W. ¼	14	"	"
Lot 1—N. E. ¼ N. W. ¼	7	"	11E
N. E. ¼ N. ½ S. E. ¼ S. E. ¼ S. E. ¼	7	"	"

Filed Sept. 14, 1903. Approved Sep. 15, 1903. Sel'n List No. 52, Deaf & Dumb Asylum. Filed in U. S. L. O. Sept. 17, 1903. Appd. by U. S. L. O. Sept. 25, 1903. All except S. E. ¼ Sec. 13S.—10E. 603A. Appd. Washington, Dec. 1, 1904.

——— ———, Atty.

Duplicate sent. Notify. Sept. 29, 1903. S. B. Milner."

[fol. 514] Whereupon plaintiff offered in evidence Exhibits No. 13 to 17, to which the same objections were made and the same rulings by the court. The exceptions of counsel for defendants and intervener noted. Whereupon Exhibits 13 to 17 were read in evidence as follows:

Gov't Exhibit 13

Ex. 13, Govt. Ex. 13, Plff. J. W. C.

No. 4588. School of Mines Lands

Certificate of Sale

"This is to certify, That the State of Utah has this day sold unto Stanley B. Milner of Salt Lake City, County of Salt Lake and State of Utah, in the manner provided by law, the following described State School of Mines Land, situated and lying in the County of Carbon, State of Utah, to-wit:

"The South East Quarter (S. E. ¼) and the North West Quarter (N. W. ¼) of Section 27; the South Half (S. ½) of Section 33; All of Section thirty-four, and the South Half (S. ½) of Section Thirty-five in Township 12 South Range 11 East of the Salt Lake Meridian containing Nineteen Hundred and Twenty (1920) Acres, more or less according to the survey of the United States for the sum of Two Thousand Eight Hundred and Eighty 00— Dollars, upon the following terms and conditions to-wit: 25c per Acre of the purchase price cash in hand, and the balance in 10 equal annual payments, with interest at the rate of five per cent per annum on deferred payments, interest payable annually in advance on the first day of January, of each year. Payments have been made by the said Stanley B. Milner of $480.00 being the 25c per acre of the purchase price, and $50.00 being the interest on the unpaid principal from the date of purchase to January 1, 1902. Interest and principal payable at the office of the State Board of Land Commissioners at the times and in the manner following, that is to say:

Payments No.	Annual payment, principal	Annual payment, interest	Annual payment, total	When due Month	Day	Year
1.....	240	108	348	January	1st	1902
2.....	240	96	336	do.	do.	1903
3.....	240	84	324	do.	do.	1904
4.....	240	72	312	do.	do.	1905
5.....	240	60	300	do.	do.	1906
6.....	240	48	288	do.	do.	1907
7.....	240	36	276	do.	do.	1908
8.....	240	24	264	do.	do.	1909
9.....	240	12	252	do.	do.	1910
10.....	240		240	do.	do.	1911

[fol. 315] "No timber shall be cut on said land except for necessary purposes of fuel for the family of the owner of this certificate residing upon said land, and for the erection thereupon of buildings and fences, and repairing the same; and in no case whatever shall waste or spoil be made on the premises.

"In case the said Stanley B. Milner, his assigns, heirs, or legal representatives, shall pay the several sums of money aforesaid, punctually at the time above limited, and in all other respects observe and comply with the laws governing the leasing, selling and general management of the Public Lands, the State of Utah will, on the surrender of this certificate, cause to be made and executed unto the said Stanley B. Milner, his assigns, heirs or legal representatives, a patent therefor. But in case default be made in said payments, or either of them, or the law under which this certificate is issued be not observed or complied with, then this certificate shall become null and void, and the right and interest of said purchaser, his assigns, heirs or legal representatives in and to the said land will be declared forfeited in the manner provided by law, and the title to said land revert to and revest in the said State of Utah, as asbolutely and fully as if this certificate had never been issued.

"Done at Salt Lake City, Utah, this 1st day of August, 1901.

"State Board of Land Commissioners, by Heber M. Wells, President.

"Attest: Byron Groo, Secretary.

"Recorded in Book E, Page 254, of Sales Record.
"A true copy.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all of my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian in the County of ——, State of Utah.

"Witness my hand this — day of ——, 190-.

—— ——.

"Two Witnesses: —— ——, —— ——.

[fol. 316] "State of Utah,
County of ——, ss:

"On the — day of ——, A. D. 190-, personally appeared before me —— ——, the signer of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

"Witness my hand this — day of ——, 1—.

—— ——.

"Two Witnesses: —— ——, —— ——.

"State of Utah,
County of ——, ss:

"On the — day of ——, A. D. 190-, personally appeared before me —— ——, the signers of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Sales Record No. —.
Sale Certificate.
The State of Utah to Stanley B. Milner, —— County.
Deseret News."

[fol. 317] GOVERNMENT'S EXHIBIT No. 14

offered and received in evidence is in words and figures as follows:

Ex. 14, Govt. Ex. 14, Plff. J. W. C.

Claim No. 1794 A. P.

No. 5136

Certificate of Sale

"This is to Certify, That the State of Utah has this day sold unto Truth A. Milner of Salt Lake City, County of Salt Lake and State of Utah, in the manner provided by law, the following described State Agrl. Coll. Land, situated and lying in the County of Carbon, State of Utah, to-wit:

The North Half (N. ½) of Section 26 in Township 12 South Range 11 East of the Salt Lake Meridian containing Three Hundred and Twenty—320 acres—more, or less according to the survey of the United States for the sum of Four Hundred and Eight- ($480) Dollars, upon the following terms and conditions to-wit: 25c per Acre of the purchase price cash in hand, and the balance in 10 equal annual payments, with interest at the rate of five per cent per annum on defered payments, interest payable annually in advance on the first day of January, of each year. Payments have been made by the said Truth A. Milner of $80.00, being the 25c per acre of the purchase price, and $18,04, being the interest on the unpaid principal from the date of purchase to January 1, 1903. Interest and principal payable at the office of the State Board of Land Commissioners at the times and in the manner following, that is to say:

Payments No.	Annual payment, principal	Annual payment, interest	Annual payment, total	When due Month	Day	Year
1.....	40	18	58	January	1st	1903
2.....	40	16	56	do.	do.	1904
3.....	40	14	52	do.	do.	1905
4.....	40	12	52	do.	do.	1906
5.....	40	10	50	do.	do.	1907
6.....	40	8	48	do.	do.	1908
7.....	40	6	46	do.	do.	1909
8.....	40	4	44	do.	do.	1910
9.....	40	2	42	do.	do.	1911
10.....	40		40	do.	do.	1912

"No timber shall be cut on said land except for necessary purposes of fuel for the family of the owner of this certificate residing upon said land and the erection there- [fol. 318] upon of buildings and fences, and repairing the same: and in no case whatever shall waste or spoil be made on the premises.

"In case the said Truth A. Milner, her assigns, heirs, or legal representatives, shall pay the several sums of money aforesaid, punctually at the times above limited, and in all other respects observe and comply with the laws governing the leasing, selling and general management of the Public Lands, the State of Utah will, on the surrender of this certificate, cause to be made and executed unto the said Truth A. Milner, her assigns, heirs or legal representatives, a patent therefor. But in case default be made in said payments, or either of them, or the law under which this certificate is issued to not observed or complied with, then this certificate shall become null and void, and the right and interest of said purchaser, his assigns, heirs or legal representatives in and to the said land will be declared forfeited in the manner provided by law, and the title to said land revert and revest in the said State of Utah, as absolutely and fully as if this certificate had never been issued.

"Done at Salt Lake City, Utah, this 1 day of February 1902.

"State Board of Land Commissioners, by Heber M. Wells, President.

"Attest: Byron Groo, Secretary.

"Recorded in Book F, Page 157, of Sales Record.

"A true copy.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— all of my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

"Witness my hand this — day of ——, 190-.

—— ——.

"Two Witnesses: —— ——, —— ——.

[fol. 319] "State of Utah,
County of ——, ss:

"On the — day of ——, A. D. 190-, personally appeared before me —— ——, the signer of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all of my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

"Witness my hand this — day of ——, 1—.

—— ——.

"Two Witnesses: —— ——, —— ——.

"State of Utah,
County of ——, ss:

"On the — day of ——, A. D. 190-, personally appeared before me —— ——, the signers of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Sales Record No. —.
Sale Certificate.
The State of Utah to Truth A. Milner, —— County.
Deseret News."

Government's Exhibit No. 15

offered and received in evidence is in words and figures as follows:

"Ex. 15, Govt. Ex. 15, Plff.

Claim No. 2461 A. P.

No. 7174. Agrl. College Lands.

Certificate of Sale

"This is to Certify, that the State of Utah has this day sold unto Truth A. Milner of Salt Lake City, County of Salt [fol. 320] Lake and State of Utah, in the manner provided

by law, the following described State Agrl. College Land, situated and lying in the County of Carbon, State of Utah, to-wit:

The North Half (N. ½) of Section 33, in Township 12 South, Range 11 East, Lots One (1) Two (2) and Three (3), and the South East Quarter (S. E. ¼) of the South East Quarter (S. E. ¼) of Section 3 in Township 13 South Range 11 East of the Salt Lake Meridian containing Four Hundred and Seventy Seven & 04/100 (477.04) acres, more or less according to the survey of the United States for the sum of Seven Hundred and Fifteen & ($714.56) 56/100 Dollars, upon the following terms and conditions, to-wit: 25c per Acre of the purchase price cash in hand, and the balance in 10 equal annual payments, with interest at the rate of five per cent per annum on deferred payments, interest payable annually in advance on the first day of January, of each year. Payments have been made by the said Truth A. Milner of $199.26, being the 25c per acre of the purchase price, and 12.40, being the interest on the unpaid principal from the date of purchase to January 1, 1904. Interest and principal payable at the office of the State Board of Land Commissioners at the times and in the manner following, that is to say:

Payments No.	Annual payment, principal	Annual payment, interest	Annual payment, total	When due Month	Day	Year
1.....	59.63	26.84	86.47	January	1st	1904
2.....	59.63	23.86	83.49	do.	do.	1905
3.....	59.63	20.88	80.51	do.	do.	1906
4.....	59.63	17.89	77.52	do.	do.	1907
5.....	59.63	14.91	74.54	do.	do.	1908
6.....	59.63	11.93	71.56	do.	do.	1909
7.....	59.63	8.95	68.58	do.	do.	1910
8.....	59.63	5.97	65.60	do.	do.	1911
9.....	59.63	2.99	62.62	do.	do.	1912
10.....	59.63		59.63	do.	do.	1913

"No timber shall be cut on said land except for necessary purposes of fuel for the family of the owner of this certificate residing upon said land, and for the erection thereupon of buildings and fences, and repairing the same; and in no case whatever shall waste or spoil be made on the premises.

"In case the said Truth A. Milner, her assigns, heirs, or legal representatives, shall pay the several sums of money [fol. 321] aforesaid, punctually at the times above limited, and in all other respects observe and comply with the laws

governing the leasing, selling and general management of the Public Lands, the State of Utah will, on the surrender of this certificate, cause to be made and executed unto the said Truth A. Milner, her assigns, heirs or legal representatives, a patent therefor. But in case default be made in said payments, or either of them, or the law under which this certificate is issued *to* not observed or complied with, then this certificate shall become null and void, and the right and interest of said purchaser, his assigns, heirs or legal representatives in and to the said land will be declared forfeited in the manner provided by law, and the title to said land revert and revest in the said State of Utah, as absolutely and fully as if this certificate had never been issued.

"Done at Salt Lake City, Utah, this 1st day of August, 1903.

"State Board of Land Commissioners, by Heber M. Wells, President.

"Attest: Byron Groo, Secretary.

"Recorded in Book H Page 259 of Sales Record.

"A true copy.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all of my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, the County of ——, State of Utah.

"Witness my hand this — day of ——, 190–.

"—— ——. Two Witnesses: —— ——, —— ——.

"State of Utah,
County of ——, ss:

"On the — day of ——, A. D. 190–, personally appeared before me —— ——, the signer of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

[fol. 322] "Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and

transfer unto the said —— —— all my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in *in* the County of ——, State of Utah.

—— ——.

"Witness my hand this — day of ——, 1—.

—— ——.

"Two Witnesses: —— ——, —— ——.

"STATE OF UTAH,
County of ——, ss:

"On the — day of ——, A. D. 190–, personally appeared before me —— ——, the signers of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Sales Record No. 7174.
Sale Certificate.
The State of Utah to Truth A. Milner, —— County.
Deseret News."

GOVERNMENT'S EXHIBIT No. 16

offered and received in evidence, is in words and figures as follows:

"Ex. 16, Govt. Ex. 16, Plff. J. W. C.

Claim No. 3034 A. P.

No. 8042. Agrl. College Lands

Certificate of Sale

"This is to Certify That the State of Utah has this day sold unto Harley O. Milner of Salt Lake City, County of Salt Lake and State of Utah, in the manner provided by law, the following described State Agrl. College land, situated and lying in the County of Carbon, State of Utah, to-wit:

All of Section 1; All of Section 3; the North Half (N. ½) of Section 10; the North Half (N. ½) of Section 11, and the [fol. 323] North Half (N. ½) of Section 12 in Township 13

South Range 10 East of the Salt Lake Meridian containing Twenty-two Hundred and Forty-four and 24/100 (2244.24) acres more of less according to the survey of the United States for the sum of Thirty-three Hundred and Sixty-six & 36/100 Dollars, upon the following terms and conditions, to-wit : 25c per Acre of the purchase price cash in hand, and the balance in 10 equal annual payments, with interest at the rate of five per cent per annum on deferred payments, interest payable annually in advance on the first day of January of each year. Payments have been made by the said Harley O, Milner of $561.06/100, being the 25c per acre of the purchase price, and $81.83/100, being the interest on the unpaid principal from the date of purchase to January 1, 1905. Interest and principal payable at the office of the State Board of Land Commissioners at the times and in the manner following, that is to say:

Payments No.	Annual payment, principal	Annual payment, interest	Annual payment, total	When due Month	Day	Year
1.....	280.53	126.24	406.77	January	1st	1905
2.....	280.53	112.22	392.75	do.	do.	1906
3.....	280.53	98.19	378.72	do.	do.	1907
4.....	280.53	84.16	364.69	do.	do.	1908
5.....	280.53	70.14	350.67	do.	do.	1909
6.....	280.53	56.11	336.64	do.	do.	1910
7.....	280.53	42.08	322.61	do.	do.	1911
8.....	280.53	28.06	308.59	do.	do.	1912
9.....	280.53	14.03	294.56	do.	do.	1913
10.....	280.53		280.53	do.	do.	1914

"No timber shall be cut on said land except for necessary purposes of fuel for the family of the owner of this certificate residing upon said land, and for the erection thereupon of buildings and fences, and repairing the same; and in no case whatever shall waste or spoil be made on the premises.

"In case the said Harley O. Milner, his assigns, heirs, or legal representatives shall pay the several sums of money aforesaid, punctually at the time above limited, and in all other respects observe and comply with the laws governing the leasing, selling and general management of the Public Lands, the State of Utah will, on the surrender of this certificate, cause to be made and executed unto the said Harley O. Milner, his assigns, heirs or legal representatives, a pat- [fol. 324] ent therefor. But in case default be made in said payments or either of them, or the law under which this cer-

tificate is issued be not observed or complied with, then this certificate shall become null and void, and the right and interest of said purchaser, his assigns, heirs or legal representatives in and to the said land will be declared forfeited in the manner provided by law, and the title to said land revert and revest in the said State of Utah, as absolutely and fully as if this certificate had never been issued.

"Done at Salt Lake City, Utah, this 1st day of June, 1904.

"State Board of Land Commissioners, by Heber M. Wells, President.

"Attest: Byron Groo, Secretary.

"Recorded in Book I Page 229 of Sales Record.

"A true copy.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all of my right, title and interest in and to the said ——, of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

"Witness my hand this — day of ——, 190–.

—— ——.

"Two Witnesses: —— ——, —— ——.

"STATE OF UTAH,
County of ——, ss:

"On the — day of ——, A. D. 190—, personally appeared before me —— ——, the signer of the above instrument, who duly acknowledged to me that he executed same.

—— ——.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all my right, title and [fol. 325] interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

"Witness my hand this — day of ——, 1—.

—— ——.

"Two Witnesses: —— ——, —— ——.

"STATE OF UTAH,
County of ——, ss:

"On the — day of ——, A. D. 190—, personally appeared before me —— ——, the signers of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Sales Record No. —.
Sale Certificate.
The State of Utah to Harley O. Milner, —— County.
Deseret News."

GOVERNMENT'S EXHIBIT No. 17

offered and received in evidence, is in words and figures as follows:

"Ex. 17, Govt. Ex. 17, Plff. J. W. C.

Claim No. 3374 A. P.

No. 8564. Deaf & Dumb Asylum Lands

Certificate of Sale

"This is to Certify, That the State of Utah has this day sold unto Samuel H. Gilson of Salt Lake City, County of Salt Lake and State of Utah, in the manner provided by law, the following described State Deaf & Dumb Asylum Land, situated and lying in the County of Carbon, State of Utah, To-wit:

Date of Sale: Jan. 1, 1905.

The South East quarter (S. E. ¼) of Section 12; the East Half (E. ½) of the North East Quarter (N. E. ¼) of Section 14, in Township 13 South, Range 10 East; Lot one (1); the North East Quarter (N. E. ¼) of the North West Quarter (N. W. ¼) the North East Quarter (N. E. ¼); the North half (N. ½) of the South East Quarter (S. E. ¼) and the South East quarter (S. E. ¼) of the South East Quarter [fol. 326] (S. E. ¼) or Section 7 in Township 13 South Range 11 East of the Salt Lake Meridian containing Six Hundred and Three (603) acres, more or less according to the survey of the United States for the sum of Nine Hun-

dred and Four and ($904.50)—50/100 Dollars, upon the following terms and conditions to-wit: 25c per Acre of the purchase price cash in hand, and the balance in 10 equal annual payments, with interest at the rate of five per cent per annum on deferred payments, interest payable annually in advance on the first day of January, of each year. Payments have been made by the said Samuel H. Gilson of $150 75/100, being the 25c per acre of the purchase price, and $7.69/100, being the interest on the unpaid principal from the date of purchase to January 1, 1906. Interest and principal payable at the office of the State Board of Land Commissioners at the times and in the manner following, that is to say:

Payments No.	Annual payment, principal	Annual payment, interest	Annual payment, total	When due Month	Day	Year
1.....	75.37	330.92	109.29	January	1st	1906
2.....	75.37	30.15	105.52	do.	do.	1907
3.....	75.37	26.39	101.76	do.	do.	1908
4.....	75.37	22.62	97.99	do.	do.	1909
5.....	75.37	18.85	94.22	do.	do.	1910
6.....	75.37	15.08	90.45	do.	do.	1911
7.....	75.37	11.31	86.68	do.	do.	1912
8.....	75.37	7.54	82.91	do.	do.	1913
9.....	75.37	3.78	79.15	do.	do.	1914
10.....	75.42		75.42	do.	do.	1915

"No timber shall be cut on said land except for necessary purposes of fuel for the family of the owner of the certificate residing upon said land, and for the erection thereupon of buildings and fences, and repairing the same; and in no case whatever shall waste or spoil be made on the premises.

"In case the said Samuel H. Gilson, his assigns, heirs, or legal representatives, shall pay the several sum of money aforesaid, punctually at the times above limited, and in all other respects observe and comply with the laws governing the leasing, selling and general management of the Public Lands, the State of Utah will, on the surrender of this certificate, cause to be made and executed unto the said Samuel H. Gilson, his assigns, heirs or legal representatives, a patent therefor. But in case default be made in said payments, [fol. 327] or either of them, or the law under which this certificate is issued be not observed or complied with, then this certificate shall become null and void, and the right and interest of said purchaser, his assigns, heirs or legal representatives in and to the said land will be declared forfeited in the manner provided by law, and the title to said land revert

and revest in the said State of Utah, as absolutely and fully as if this certificate had never been isssued.

"Done at Salt Lake City, Utah, this 15th day of April, 1905.

"State Board of Land Commissioners, by William Spry, President.

"Attest: J. D. Dixon, Secretary.

"Recorded in Book J Page 84 of Sales Record.
"A true copy.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all of my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

"Witness my hand this — day of ——, 190-.

—— ——.

"Two Witnesses: —— ——, —— ——.

"State of Utah,
County of ——, ss:

"On the — day of ——, A. D. 190-, personally appeared before me —— ——, the signer of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Assignment

"For and in consideration of the sum of — Dollars, to me in hand paid by —— ——, of ——, I hereby sell, assign and transfer unto the said —— —— all my right, title and interest in and to the said —— of Section —, Township —, Range —, Salt Lake Meridian, in the County of ——, State of Utah.

[fol. 328] "Witness my hand this — day of ——, 1—.

—— ——.

"Two Witnesses: —— ——, —— ——.

"STATE OF UTAH,
County of ——, ss:

"On the — day of ——, A. D. 190-, personally appeared before me —— ——, the signers of the above instrument, who duly acknowledged to me that he executed the same.

—— ——.

"Sales Record No. —.
Sale Certificate.
The State of Utah to Samuel H. Gilson, —— County.
Deseret News."

[fol. 329] Whereupon the complainant offered in evidence a certified copy of the articles of incorporation of the Carbon County Land Company, identified as Government's Exhibit 18, which offer was objected to by the defendants and the intervener for the reason that the evidence offered is immaterial, which objections were overruled and the exceptions noted by the intervener and by defendants. Whereupon complainant's Exhibit 18 was read in evidence as follows:

Ex. 18, Govt.

"Articles of Incorporation of the Carbon County Land Company

"UNITED STATES OF AMERICA,
State of Utah,
County of Salt Lake, ss:

"We, the undersigned, whose full names and places of residence are:

Harrison E. Jenkins, Salt Lake City, Utah;
B. D. Newman, Salt Lake City, Utah;
A. C. Sadler, Salt Lake City, Utah;
Edward E. Jenkins, Salt Lake City, Utah;
Hiram E. Booth, Salt Lake City, Utah;

for the purpose of forming a corporation under and by virtue of the laws of the State of Utah, do hereby associate ourselves together and agree as follows:

"Article I

"The name of the corporation hereby formed shall be the Carbon County Land Company, and said corporation is organized in the City of Salt Lake, County of Salt Lake, State of Utah.

"Article II

"The corporation shall exist for one hundred (100) years unless sooner dissolved according to law.

"Article III

"The business of corporation shall be: To buy, acquire, own, improve, rent, lease, mortgage, sell and dispose of real estate in the State of Utah and elsewhere; to loan money, to buy, own, acquire, mortgage, pledge, hypothecate, sell, assign, transfer, and dispose of personal property; to buy, acquire, construct, own, operate, lease, rent, and dispose of power plant, electric light plants and systems, telephone plants and systems, water works and systems, street and other railroads in the State of Utah and elsewhere; and [fol. 330] to acquire, own, hold, maintain, control, mortgage, bond, lease, sell, convey, assign, transfer and dispose of franchises therefor; to buy, acquire, own, pledge, hypothecate, sell, assign, transfer and dispose of stocks in other incorporate companies; to operate coal mines, and sell and dispose of the products therefrom; to buy, acquire, own, pledge, hold, hypothecate, sell, assign, transfer, release and dispose of bonds, notes, mortgages, debentures and other evidence of indebtedness.

"Article IV

"The principal place of business and general office of the corporation shall be at Salt Lake City, Utah; but branch offices may be established at any other place or places in the United States.

"Article V

"The amount of capital stock of this corporation shall be Ten Thousand ($10,000.00) Dollars divided into one hundred thousand (100,000) shares of the denomination and par value of Ten (10c) cents each.

"Article VI

"The said capital stock as hereinbefore stated is paid up in the manner and form as hereinafter stated and is subscribed by the corporation hereto, parties hereto, as follows:

Harrison E. Jenkins, 10 Shares;
Hiram E. Booth, 10 Shares;
B. D. Newman, 10 Shares;
A. C. Sadler, 10 Shares;
Edward E. Jenkins, 10 Shares;
Harrison E. Jenkins, Trustee, 88,950 Shares.

"Article VII

"The whole amount of the capital stock of this corporation, to-wit: Ten Thousand Dollars ($10,000.00) is fully paid in cash.

"Article VIII

"The officers of this corporation shall be a board of directors of three members, two of said directors shall constitute a quorum for the transaction of the business of this corporation. There shall also be a president, vice-president, secretary, and treasurer. The president and vice-president shall be directors. The offices of secretary and treasurer may be held by one person. To be eligible to any office, except the offices of secretary and treasurer, the person must be the owner of at least Ten (10) shares of the [fol. 331] capital stock of this corporation in his own right as shown by the books of the company.

"Article IX

"Except as stated in Article X, and except when a vacancy is filled, the directors shall be elected by ballot at the regular meeting of the stockholders of this corporation, or at an adjourned meeting thereof, or at a meeting of the stockholders duly called for the purpose of said election after the time for holding the regular stockholders' meeting shall have elapsed and no meeting has been held on the day for the said regular annual meeting. At said or any stockholders' meeting, each stockholder shall be entitled to as many votes as he has shares of stock in this corporation; and any stock-

holder duly qualified to hold office, who shall receive a majority of all of the votes cast at said or any election for such office, shall be declared elected. The president, vice-president, secretary and treasurer shall be elected by the Board of Directors at the first meeting of said Board of Directors, after such annual meeting of the stockholders or other stockholders' meeting in which such directors shall have been elected. And in order to effect such election, the directors elected shall, within five days after their election, meet for the purpose of electing the other officers of this corporation hereinbefore named, and at said meeting shall vote by ballot for the persons to fill the said offices of president, vice-president, secretary and treasurer, and the person receiving the votes of four or more of said directors, at said meeting, shall be declared elected. The officers so elected shall hold office for a period of one year, or until their successors are elected and qualified. The president, vice-president, secretary and treasurer may be removed by a majority vote of the directors of this corporation, or at any meeting of the board of directors duly and regularly called to consider the question of such removal. Any director of this corporation may be removed by a two-thirds vote of all the issued stock of this corporation at any regular or special meeting of the stockholders duly called to consider the question of such removal.

"Any officer may resign by handing his resignation in writing to any other officer of this corporation, but such resignation shall not be effectual until accepted by the Board of Directors, or by the stockholders at a meeting duly called to consider such resignation.

[fol. 332] "Article X

"Until the first annual meeting of the stockholders and the election and qualification of the officers, the following named persons shall be directors, to-wit: Harrison E. Jenkins; B. D. Newman; A. C. Sadler; Edward E. Jenkins and Hiram E. Booth.

"And the said Hiram E. Booth shall be president, and the said B. D. Newman shall be vice-president, and the said Harrison E. Jenkins shall be secretary and treasurer.

"Article XI

"There shall be a meeting for the election of officers of this corporation on the first Tuesday after the first Monday of March, 1904, and annually thereafter; but the time for holding the annual meeting of stockholders may be changed to any annual meeting of the stockholders.

"Article XII

"The Board of Directors may fill vacancies in the Board or any of the offices of this corporation until the next annual meeting of the stockholders of this corporation; and may accept the resignation of any officer on notice served on any director or other officer.

"Article XIII

"The private property of the stockholders shall not be liable for the debts, obligations or liabilities of this corporation.

"Article XIV

"The capital stock of this corporation shall be assessable, in the manner provided by law.

"Article XV

"The Board of Directors may enact by-laws for the regulation and government of the business and officers of this corporation.

"In witness whereof we have hereunto set our hands this 9th day of March, A. D. 1903.

"Signed in the presence of S. B. Milner.

Harrison E. Jenkins, B. D. Newman, Edward E. Jenkins, A. C. Sadler, Hiram E. Booth.

[fol. 333] "STATE OF UTAH,

Salt Lake County, ss:

"Harrison Jenkins, B. D. Newman and A. C. Sadler each being duly sworn, depose and say: each for himself, and not one for the other; that he is not of the incorporators named

in and who subscribed the foregoing articles of incorporation of the Carbon County Land Company; that it is the bona fide intention of the parties to said agreement to commence and carry on the business mentioned in said agreement; and the affiants verily believe that each party to said agreement has paid the full amount of his stock subscribed for by him, in the manner set forth in said articles of incorporation.

Harrison E. Jenkins, B. D. Newman, A. C. Sadler.

"Subscribed and sworn to before me this 10th day of March, A. D. 1903. Winnie E. Bernhardt, Notary Public. My commission expires February 5th, 1907. (Seal,)

"Endorsed: No. 3692, 'Carbon County Land Company.' Filed in the Clark's Office, Salt Lake County, Utah, Mar. 10, 1903, John James, County Clerk; By Helena A. McIntosh, Deputy Clerk. Recorded in 'Y.' of Corporations, pages 280-283.

"STATE OF UTAH,
County of Salt Lake, ss:

"I, Harrison E. Jenkins, having been duly elected to the office of Director, Secretary and Treasurer, of the Incorporation known by the name and style of The Carbon County Land Company, being first duly sworn according to law, on oath do say, that I will well and faithfully do and perform the duties of such office to the best of my judgment, skill and ability, and that I will not do nor consent to the doing of any matter or thing relating to the business of said Incorporation with intent to defraud any stockholder therein, or creditor thereof, or the public.

Harrison E. Jenkins.

[fol. 334] "Sworn and subscribed before me the 10th day of March, 1903. Winnie E. Bernhardt, Notary Public, Salt Lake County, Utah. My commission expires February 5th, 1907. (Seal.)

"Endorsed: No. 3692. Oath or affirmation of Director of ——. Filed in the Clerk's Office, Salt Lake County, Utah, Mar. 10, 1903. John James, County Clerk, by Helena A. McIntosh, Deputy Clerk.

"STATE OF UTAH,
County of Salt Lake, ss:

"I, Hiram E. Booth, having been duly elected to the office of Director and President of the Incorporation known by the name and style of The Carbon County Land Company, being first duly sworn according to law, on oath do say, that I will well and faithfully do and perform the duties of such office to the best of my judgment, skill and ability, and that I will not do nor consent to the doing of any matter or thing relating to the business of said Incorporation with intent to defraud any stockholder therein, or creditor thereof, or the public.

Hiram E. Booth.

"Sworn and subscribed before me the 10th day of March, 1903. Winnie E. Bernhardt, Notary Public, Salt Lake County, Utah. My commission expires February 5th, 1907. (Seal.)

"Endorsed: No. 3692. Oath or affirmation of Director of ——. Filed in the Clerk's Office, Salt Lake County, Utah, Mar. 10, 1903. John James, County Clerk, by Helena A. McIntosh, Deputy Clerk.

"STATE OF UTAH,
County of Salt Lake, ss:

I, B. D. Newman, having been duly elected to the office of Director and Vice-President, of the Incorporation known by the name and style of The Carbon County Land Company, being first duly sworn according to law, on oath do say, that I will well and faithfully do and perform the duties of such office to the best of my judgment, skill and ability, and that I will not do nor consent to the doing of any matter or [fol. 335] thing relating to the business of said Incorporation with intent to defraud any stockholder therein, or creditor thereof, or the public.

B. D. Newman.

"Sworn and subscribed before me the 10th day of March, 1903. Winnie E. Bernhardt, Notary Public, Salt Lake County, Utah. My commission expires February 5th, 1907. (Seal.)

"Endorsed: No. 3692. Oath or affirmation of Director of ——. Filed in the Clerk's Office, Salt Lake County, Utah,

Mar. 10, 1903. John James, County Clerk, by Helena A. McIntosh, Deputy Clerk.

"STATE OF UTAH,
County of Salt Lake, ss:

"I, S. B. Milner, having been duly elected to the office of Director and Treasurer of the Incorporation known by the name and style of the Carbon County Land Co., being first duly sworn according to law, on oath do say, that I will well and faithfully do and perform the duties of such office to the best of my judgment, skill and ability, and that I will not do nor consent to the doing of any matter or thing relating to the business of said Incorporation with intent to defraud any stockholder therein, or creditor thereof, or the public.

S. B. Milner.

"Sworn and subscribed before me the 5th day of October, 1904. Winnie E. Bernhardt, Notary Public, Salt Lake County, Utah. My commission expires February 5th, 1907. (Seal.)

"Endorsed: No. 3692. Oath or affirmation of Director of ——. Filed in the Clerk's Office, Salt Lake County, Utah, Oct. 5, 1903. John James, County Clerk, by Helena A. McIntosh, Deputy Clerk.

"STATE OF UTAH,
County of Salt Lake, ss:

"I, Archibald C. Milner, having been duly elected to the office of Director of the Incorporation known by the name and style of the Carbon County Land Co., being first duly [fol. 336] sworn according to law, on oath do say, that I will well and faithfully do and perform the duties of such office to the best of my judgment, skill and ability, and that I will not do nor consent to the doing of any matter or thing relating to the business of said Incorporation with intent to defraud any stockholder therein, or creditor thereof, or the public.

Archibald C. Milner.

"Sworn and subscribed before me the 5th day of October, 1904. Winnie E. Bernhardt, Notary Public, Salt Lake County, Utah. My commission expires February 5th, 1907. (Seal.)

"Endorsed: No. 3692. Oath or affirmation of Director of ——. Filed in the Clerk's Office, Salt Lake County, Utah, Oct. 5, 1903. John James, County Clerk, by Helena A. McIntosh, Deputy Clerk.

"STATE OF UTAH,
County of Salt Lake, ss:

"I, Clarence E. Milner, having been duly elected to the office of Director of the Incorporation known by the name and style of the Carbon County Land Co., being first duly sworn according to law, on oath do say, that I will well and faithfully do and perform the duties of such office to the best of my judgment, skill and ability, and that I will not do nor consent to the doing of any matter or thing relating to the business of said Incorporation with intent to defraud any stockholder therein, or creditor thereof, or the public.

Clarence E. Milner.

"Sworn and subscribed before me the 5th day of October, 1904. Winnie E. Bernhardt, Notary Public, Salt Lake County, Utah. My commission expires February 5, 1907. (Seal.)

"Endorsed: No. 3692. Oath of affirmation of Director of ——. Filed in the Clerk's Office, Salt Lake County, Utah, Oct. 5, 1904. John James, County Clerk, by Helena A. McIntosh, Deputy Clerk.

"G-61.

[fol. 337] STATE OF UTAH,
County of Salt Lake, ss:

"I Margaret Zane Witcher, County Clerk in and for the County of Salt Lake, in the State of Utah, do hereby certify that the foregoing is a full, true and correct copy of the original articles of incorporation and oaths of office, being all the papers filed in this office up to this date of the Carbon County Land Company as appears of record in my office.

"In Witness Whereof, I have hereunto set my hand and affixed my official seal, this 15th day of March, A. D. 1910.

Margaret Zane Witcher, County Clerk, by Lillian McLachland, Deputy Clerk." (Seal.)

HENRY WADE, witness produced by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lacy:

My name is Henry Wade and I reside in Salt Lake City and have resided here about seven years. Before that I lived in Carbon County, coming to that county which was then a part of Emery County in 1886. We lived three or four years in winter quarters of the Scofield District and then to where Castle Gate is.

My occupation is mining. While there I worked in the winter quarters of the mine and in opening up Castle Gate. The Castle Gate mine was opened up in 1889. I am familiar with the land marked in blue on the map in section 3 and section 1 on the north half of sections 10, 11 and 12 in township 13, range 10. The Castle Gate mine was open in section 1 in the same township. The Castle Gate mine was five or six miles from the west boundary of this land in question marked in blue there. It would be six miles east. Leaving the Castle Gate mine you cross section 1 in township 13, range 9, and 6, 5 and 4 in township 13, range 10, to reach this land. I was familiar with this land marked in purple as early as the year 1920. At that time it was generally known that the coal area extended east and southeast. Along the escarpment or along until you go beyond Sunnyside, also west of Castle Gate for a number of miles, there is an escarpment rises up above the level of the valley, and below the coal area there are structures of rock prominently seen, white, almost white, and wherever that line is seen you can tell where the coal exists. That prominent seam of rock [fol. 338] was white sandstone. It was called Castle Gate sandstone. As far back as 1900 that could be readily seen from the flat to the south of the escarpment and traced on the cliffs. As to the lands marked in blue in township 12 and 13, range 11 east, the escarpment will be lower down because those lands did not come up to the escarpment. Well, on the cliffs you could by tracing it around on the top, see the coal blacken.

The Court: Was that above the cliff?

Answer. The coal where that blue marking is was underneath the canyon generally.

Where this sandstone that I described appears with reference to the cliffs, some parts are four or five hundred feet above the level of the valley upon the cliffs. These parts ranged along the cliff. They extended along the cliff both south. They extended along to the escarpment east, extended beyond Sunnyside. The sandstone was up 500 feet in places. The escarpment varied in going back and forward. If it would recede it would be lower and if it come out level with the escarpment there it would be almost as high. The cliffs above this valley average from 300 to 500 feet in height. Not to the top of the mountain but where the escarpment was. The other would be a thousand feet or more. Coal Canyon is identified there in the map. There were openings made in Coal Canyon at that time. It was a long time, you know, 28 years, and a man's memory is not very good. I just got that subpœna yesterday. Well some of those canyons extend up two or three miles before the coal comes down with the level of the canyon. In Coal Canyon there were several openings and in the Lane Canyon, I should say two or three openings. That was in 1898 I saw two or three openings. I was in the Utah Fuel Company's employ at that time, or it was the Pleasant Valley Coal Company. There was one district, there were made in two or three series on three or four veins running through that district. On the lowest vein is a small vein that has coking qualities. There was no coal mines, but there was prospects in these other canyons breaking from the cliffs. Somebody taking up the ground and driving in and exposing the coal to show the coal is a prospect. There was a prospect in Cordingly Canyon. There was one in the straight canyon and one in the right-hand fork. Let me see that map now, up in this, it is in the right-hand fork, there was an opening there, and in the left-hand fork there was two or three openings. That was prior to 1900. The openings farthest to the [fol. 339] west would be in section 11. The Aberdeen mine was an opening. It was opened first to haul coal down to Price for local consumption. It was opened before 1896. Before the suit started. That was one of the openings that I was talking about in Cordingly Canyon. The one farther east in the other branch of the canyon would be in section 11 or 12. There was an opening in there in this canyon. It is in section 10. It would be in the northwest quarter of section 11. The Aberdeen Mine would be close to a mile

across from the south line of the land in dark blue and in purple there. Generally I would say from the Aberdeen to where the blue mark on the map is would be in the neighborhood of one section.

Mr. Wilson: What do you mean by the Aberdeen Mine?

Answer: That was a quarter section that was located by Price residents, Ballinger and Whitmore and later was sold to the Independent Coal Company.

Mr. Lacy: You mean a mine now owned by the Independent Coal?

Answer. Owned by the Independent Company.

At that time there was a mine being operated by a man by the name of Milburn for domestic purposes. That was in the right-hand fork of Cordingly Canyon. It was on the right-hand side of the canyon going up, joining the lands marked in dark blue or purple there. It would be less than a half mile from the south boundary. When I went to Price there were about 500 people living there. I couldn't say positively how many. That was in 1886. Kenilworth was a little development that was being done in 1906. Before 1900 there was probably 100 or 200 residents at Helper and 300 or 400 at Castle Gate. The mine at Sunnyside farther to the east was not being operated then. No sir, Sunnyside was a prospect and it was not opened up. If my memory serves me right, it was opened up about 1899 or 1898. I worked with the Utah Fuel Company until about 1903. Then I was prospecting, part on the reservation opening up—I prospected on the Kenilworth vein where the mine is—we located that. Section 16 in 13, 10, the north half of section 16 was coal land and the south half was below the escarpment and the coal showed up 500 feet or so above the level. I located that either in 1904, the latter part of 1904 or 1905, the early part of 1905. That was a school section and we had to apply to the Register of the Land Office, and at that time we asked for the north half of section 16 as coal land [fol. 340] and we bought from the State the south half as grazing land. The land marked in dark blue or purple on this Exhibit No. 2 lying north of the escarpment was not agricultural. It was not good grazing land. Had it been on the north slope of the mountain it would have been better grazing land, but on the south side of the mountain all that

you could get would be bunch grass and very little of that, and the mountains rise up so rapidly that it would not be very good grazing land. I had been over this particular land prior to 1901, 1904 and along there, and was familiar with it from the standpoint of coal value. Coal outcrops in certain parts, certain places and in certain canyons there on that land. There are no other particular characteristics of the land other outcrops that I observed that I have not mentioned, not adjacent to that, but following the escarpment around you could tell where the outcrop was and the coal land that extended beyond that in the north, the portion that would have the more cover would be a better grade of coal land than around the escarpment. I mean by that better as you get into the mountain. Yes, there would be burnt coal around the escarpment; generally it is burnt in for a certain distance and some places it is in more than the others.

EDWARD E. JENKINS, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Lacy:

I think I was one of the incorporators of the Carbon County Land Company. This certified copy of the articles of incorporation shows my signature. According to my memory now I would say no, that I do not have any knowledge of forming that corporation, entirely forgotten all about it. I haven't any recollection of receiving anything for any compensation for the use of my name in the forming of that company. I don't know at whose instance I signed the articles of incorporation if I did sign them. It may have been at the instance of Mr. Stanley B. Milner, and it may have been at the instance of my brother, who is here. Mr. Harrison Jenkins, he is secretary.

Cross-examination.

By Mr. King:

Back in about the year 1900 to 1904 I was chief clerk in the Internal Revenue Office. In 1896 I had been connected with the firm of Booth, Lee and Gray. About that time I

was connected with Mr. Milner in a mining company. I [fol. 341] was an associate of Mr. Milner's in various mining companies up until his death. I have no memory as to the circumstances with reference to the organizing of this company.

Mr. WADE recalled.

Cross-examination.

By Mr. King:

I do not claim to be an expert geologist. I don't assume to give the testimony I have given here as an expert geologist. I have been engaged either in coal mining or in prospecting ever since I came to this country. When I first came to Utah, I went to Scofield. I was there for a short time, between three or four years. From there I went to Castle Gate. In order to get to Scofield you branch off from the Rio Grande Railroad at what was then known as P. V. Junction, now known as Colton. You go up on top of what is the top of the Wasatch range of mountains, as it extends south from the Salt Lake Valley. Yes, sir, you go up the canyon; that is, right up on what would be the west side of the coal area in Carbon County. The mines that I was there engaged in at that time were first for the Winter Quarters Mine. The vein of coal that I operated at Winter Quarters was a vein separate and distinct entirely from what is known as the Castle Gate vein. No, sir, we did not have various different veins of coal in that section of the country that do not show on the escarpment in the vicinity of Castle Gate. I know that there are veins at Winter Quarters that are different from the veins which are at Scofield, less than two miles away. The vein that was mined by the Pleasant Valley Coal Company at Winter Quarters is a different vein from that mined and operated by the Union Pacific Company at Scofield. It is a different vein of coal, and we also have within about six miles south another vein of coal up at Clear Creek that does not correspond either with the Union Pacific vein or with the Winter Quarters vein. It is a different vein. I came down to Castle Gate in 1888 or 1889. I was there two or three years

in the coal operations. I was located at Castle Gate all told about ten or fifteen years, up until the year 1903 or 1904. No sir, my operations and investigations were not confined largely to the Castle Gate Mine itself, but I was right through that district. My mining operations during that time was with the Pleasant Valley Company. From 1888 or 1889 up until about 1899 or 1900, there was no real coal operations between Castle Gate and Sunnyside, a distance of approximately 35 or 38 miles. There were prospects. [fol. 342] There was no producing mine and there is none up to date except at Kenilworth. They were working on Willow Creek Mine.

The Court: Let me ask you, Mr. King, what is the purpose of this cross-examination?

Mr King: I do that by reason of his attempted testimony with reference to the coal-bearing strata of this ground that is now involved, and I am asking him now with reference to these operations there for a distance of forty miles.

The Court: The reason I asked you I believe your company is the Carbon County Land Company.

Mr. King: Yes.

The Court: That is the one the judgment went against in the old case?

Mr. King: Yes.

The Court: Don't you think you are estopped by that judgment, that it is res adjudicata?

Mr. King: I don't think I am in view of the pleadings of the issues as drawn in this case.

The Court: All right then, you go ahead if that is your theory.

Mr. King:

Q. Now, Mr. Wade, you know as a fact, do you not, that the only mine, I am asking you now as a coal mine, that was opened between 1898 and coming back at least until 1909 for a distance of over 40 miles was the mine at Sunnyside?

Mr. Lacy: Plaintiff interposes the objection to that line of testimony and the examination of the witness by the attorney for the Carbon County Land Company for the reason that those questions have been determined in the

prior case so far as the Carbon County Land Company is concerned, between the Carbon County Land Company and the Government, all questions as to the character of this land have been adjudicated in that case and that adjudication has been pleaded.

The Court: The objection is overruled although I am inclined to think the objection is well taken at the present time.

Mr. Wade: There was one little working opened in Wil- [fol. 343] low Creek with an independent company between Castle Gate and Sunnyside. That is in Willow Creek close to where the Utah Fuel Company is operating now. Coming around on the escarpment there was a little coal produced that was used down at Price. Outside of those two and Willow Creek there was not what you would call a coal-producing mine, that is where there was coal mined for commercial purposes and sold on the general market. During those years the next mining that was done then was old Sunnyside, 35 or 40 miles away. Along about 1902 or 1903 I located some ground in section 16 that I mentioned a while ago at what is known as Kenilworth. The north half of that section I located as coal mining ground. The south half I took from the State of Utah's grazing ground and entered it as such. A little later on through my association with Mr. Lawley and finally with the Sweet Brothers there was organized a company that finally developed into what is now known as the Independent Coal and Coke Company. It was ground that finally went into and formed the basis of the organization of the Independent Coal and Coke Company.

Yes sir, I spoke this morning of a certain formation a sand formation traceable on the escarpment that indicated the presence of coal. Only one place to my knowledge did it occur where the indication of coal appears upon the escarpment that when they went into it as far as a thousand feet it was entirely what is called burnt out coal. That was in Bull Hollow on the ground of the Independent Coal and Coke Company on the north half of section 9, immediately west of the ground about which Mr. Lacy interrogated me, between section 16 and 10 shown on the map here. In that place there was as much as 1,000 feet of burnt out coal. There has been development in section 16. I didn't value the coal at the escarpment as much as I did

the ground behind. The mere fact that I saw that coal blossom on the face meant of necessity that it was good coal ground but burnt out in some places. In some parts you had to develop it to determine that it was a coal mine and in other parts there was natural exposure. I am very familiar with Spring Canyon. I know where the Standard Mine is and where the Spring Canyon Coal is and where the Liberty Mine is. I don't know that immediately as you proceed west of Spring Canyon on your left-hand side as you go that you have got there every indication of coal in a tongue of the mountain that comes down there and every foot of it is burnt out. I don't know that in the Castle Gate vein in that section there is not a pound of marketable coal in thousands of acres of that ground right there at the pres-
[fol. 344] ent time, and that within the last ten years there has been developed there not a ton of coal. No sir, I don't know that. I didn't say that I ever mined any coal in Coal Canyon. I never mined any coal in what is called Cordingly Canyon or Soldier Canyon. I prospected in Dug Out Canyon. I did not mine any coal there or in Rock Canyon or in any of the other canyons between Rock Canyon and Sunnyside. We prospected in there and found in these escarpments and places what I call coal blossoms. There are no faults in that district that displace the coal there where the vein was supposed to be in places over 2,000 feet. There was a little displacement occurred in Sunnyside Canyon, and there was a little displacement close to Castle Gate. I don't know what they have done in the Castle Gate mine. I have not been in it for thirty years.

No sir. Back in 1900 and 1903 in that section of the country I did not have my disclosures of coal on each 40 acre tract when I made my entry. We were willing to pay the amount of money for it without making an exposure because we knew the coal openings were there by reason of my experience in the coal—what I had done in my development work. What I got was the ground that laid right under the escarpment. I did go back at that time and select ground that laid a mile or two miles back from the escarpment in section 4. We made application for all of section 4 at the same time as we filed on section 16. We did not locate section 9. The State and the Utah Fuel Company contested it. We were willing to pay the Government their price of $20.00 an acre. We were endeavoring to get

the ground off of section 9, section 4. We were endeavoring to buy the north half of section 9, cornered with section 16. Section 4 didn't corner with section 16. We were just within half a mile and contiguous to section 9. At the time we had already done considerable development work on 16. The land was being surveyed. I didn't know it was classified at that time.

No sir, I don't think I knew that they had a classification of it in the Land Office at Salt Lake here and maps showing that ground which Mr. Lacey asked me about and shown in this Exhibit 2 had already been classified and shown on the Government maps as grazing land. I don't know whether that was true or not as a matter of fact. No sir, I didn't know through my investigation at that time that this land involved in this action had already been examined by a Government geologist and had been mapped [fol. 345] and platted by the Government as not coal lands. I know that along in the neighborhood of 1905 after the coal entries here referred to in this case had been made the Government sent its special investigators and experts to examine these lands to determine whether they were coal lands. I knew Colonel Sowers by sight. I didn't know that he was a Government expert that had been sent into that county to examine the land. I didn't know that before the land involved in this action—before these applications had been surveyed by the Government, he had examined these lands and reported them in effect as non-coal lands. I examined section 3 in township 13 south, range 10 east, either in the latter part of 1904 or the early part of 1905. Yes, sir, section 10, the north half of section 10, in township 13, was coal land. I had been up in the canyon in 1896 and seen the exposure. I have seen the exposure where it penetrates the north half. Between 1896 and 1906 I had been all over that ground. In 1898 I had been all over it for the Pleasant Valley Coal Company. I haven't any notes of any observations that I made of the north half of section 10 at any time between 1896 and 1906. I have no distinct recollections of the conditions upon section 1 in township 13 south, range 10 east, in 1896 or in 1900. I know that there is an escarpment within practically two miles of section 1 in that township and range. No there is not. It is right on the top of the mountain. About the north half of section 12 in township 13, south, range 10

east—I think I was in Allrich Canyon. I have no data whatever with reference to anything in that 320 acres at that time. I never did any diamond drilling at any time at any place in either township 13 south, 10 east or 13 south, 11 east or 12 south in either 10 or 11 east. I never sank any shafts back a distance of 600 feet to 2 miles back of the escarpment. I never at any time discovered by diamond drill or by the sinking of shafts any coal upon these particular pieces of ground. I never sank any shaft in township 12 south, range 11 east. I never did any diamond drilling in that township at any time. I never made any definite examination between 1896 and 1906 of any forty-acre tract in part of section 22, part of section 27, part of section 26, section 36, section 35, section 34. I can only give my general observations as to the existence of conditions upon that ground between 1896 and 1906. Any practical miner would know that the ground, even if you didn't see it upon the surface, might contain coal. I had discovered at Castle Gate, at Winter Quarters and later at Kenilworth that there was certain coal veins that blossomed on the [fol. 346] escarpment of the mountain at certain places. The escarpment where I found the vein was a guide as to how far back the coal went, twenty miles long and you go into another canyon beyond that and you see coal exposed you would naturally say it went through the other canyon. Yes, I said there had been local faults in that section of the country. These displaced the coal in many instances. I don't know that there is in that section of the country a showing of the formation in some places as high as 2,000 feet. Yes sir, the escarpment continued on down on the face of the mountain west and south and southwest of the town of Price, the county seat of Carbon County.

No sir, I never had learned that between the town of Price and the town of Huntington a displacement of the coal vein of 2400 feet had been found. No, I can't always tell by that escarpment where I am going to get coal when I get back into the ground. I know that over there southwest there is a series of veins below that. Prior to the time that I began operations along about the year 1900 to 1903 the development work in Carbon County by the Utah Fuel Company was not the only development work that had ever been done. There were parties from Ogden who had done some prospecting in Willow Creek, prior to that, but they did not

have any mine in Willow Creek. Prior to the year 1900 there had been no actual mining development work done in Carbon County except through the Pleasant Valley Coal Company, afterwards the Utah Fuel, but up in Scofield the Union Pacific had a mine. The Utah Fuel had their mine in Winter Quarters and also at Clear Creek and then they came down and developed Castle Gate. The little mine at Mud Creek was started before Clear Creek, and then they jumped from there 40 miles away from Castle Gate to Sunnyside to open up a mine. There had been no mine development or actual mining of coal done to determine upon or to test the vein existing in that section of the country from Castle Gate to Sunnyside, a distance of nearly 40 miles, down to 1904. I was one of the first men who believed that the Castle Gate vein or mine might continue around that escarpment for the reason there was a natural exposure there on section 16 near Kenilworth. I do not know whether or not any part or portion of the ground covered by purple here indicated is burnt. I know in 1903 or 1904 from my own actual personal observation and experience that there was commercial coal in parts or portions of this ground. I had not developed it. I just said that I hadn't done any diamond drill- and that I hadn't used a diamond drill and I hadn't sunk a shaft.

[fol. 347] Yes, I would know whether there was any good coal. How do I know that? You don't have to look into the rocks; you don't have to look into it fifteen hundred feet. You could tell that the coal extends that distance. You could not tell that the vein would be uniform throughout that entire distance. There is no vein uniform. In the face of the escarpment you can tell whether the coal is burnt or not if you are close enough to it to see the coal or rock. Assuming that you can tell that, you cannot tell how far in it is burnt.

Questions by Mr. Wilson:

I have not been up to the mines for over ten years. I have been there since the town of Kenilworth was established. It was built some time in 1907. The Independent Coal and Coke Company was not organized during the days of my operations there. I was interested in the Independent Coal before it was organized. I had no interest in it when it was organized, and I had nothing to do with the organization of the company. I took up section 16 in town-

ship 13, range 10 east. We have it located here about where you see the word "Kenilworth" in large type on Exhibit 2. I took the north half as coal land and the south half as agricultural land from the state, it being a school section. The south half was below the escarpment, no coal content. I never tried to find any coal on it, because the coal from the escarpment was right by the north half. There was a whole section there. There was this clear distinction between the two halves of the same section. One was regarded as coal land and the other was not. I don't think that the State contested it at all but it had to be contested in the Land Office; that is, we went to the Land Office before the Receiver, Mr. Senior was our attorney, and it was granted to us and the State didn't contest it. There was just that much distinction between the two halves of the same section. The same distinction did not run through all the lands shown here on the map, designated as Exhibit 2, for the reason that the land that is designated there is under cover and the section 16, the front part or the south part of section 16, the north half, there was coal exposures on it that we opened up there, three veins. The last vein was about 20 feet and the second vein was a little over 8 feet and the other vein was—we didn't penetrate into it far enough but by the escarpment it was about 18 feet of coal.

Yes sir, I recognize a distinction between belief and knowledge. Knowledge is one thing and belief is another. [fol. 348] In dealing with these lands I have formed my own opinion. Sometimes we form opinions upon belief and sometimes on knowledge. If we have knowledge we generally don't call it an opinion. We say we know it. If we wish to arrive at some other conclusion, we say that we form our opinion upon knowledge. On the north half of section 16 we experimented to find out. On section 15 we opened up the face. That is the section contiguous to 16. Those are the only two sections in this purple area that I know anything about absolutely from experiment.

J. E. GIBSON, witness produced by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lacy:

I reside in Price, Utah. At the present time I am deputy sheriff there. I first came to Price on the first of February, 1889, and have resided in eastern Utah and western Colorado ever since. I have been somewhat acquainted with the land designated on this map in sections 1 and 3, and the north half of 10, 11 and 12 in township 13, range 10, since 1890, sometime between 1890 and 1895. I became somewhat familiar with this land marked in purple, in township 12 south, range 11 east—sections 22, 27, 26, 34, 33 and 35 sometime between 1901 and 1905, and section 7 in township 10, range 11 east, about the same time, sometime between the years 1901 and 1905. I have engaged in coal mining, having been employed by the various coal companies in nearly every capacity from way-man to general manager. I did not work in that particular country in mines in this vicinity here. During the period from 1899 to 1905 I was employed by the Utah Fuel Company at Sunnyside. At one or two different times, I won't say the date because I don't remember, I have not a record of the date, and I made various trips to the openings on the coal in the vicinity that you have mentioned, and also other vicinities for the purpose of getting samples of coal. These samples were taken to the coke ovens at Sunnyside and tested to see if they would make coke as good as the Sunnyside coke or better. It was my experience, that was my business in examining coal at this particular place. I took some samples from Dead Man and Cordingly Canyons and Dugout and Coal Canyon. Coal Canyon, Cordingly Canyon and Dead Man's Canyon. As to quality that was high-grade bituminous coal. I observed the opening in the coal in the way of prospects or coal mines, [fol. 349] and there were some prospect holes there on the outcrop of the coal in the escarpment facing south. All of them were in the canyons along the outcrop. Those veins would run from 6 to 20 feet in thickness.

I think it was in 1906 that the Sweets t gether with Mr. Wade and Mr. Strevill, I believe, went into Bull Hollow and opened up what is known as the Kenilworth mine. I be-

came acquainted with Samuel H. Gilson sometimes during the period of 1889 to 1895. I think he was in Cordingly Canyon most of the time. There was a mine open there then. That mine was about east of where the Aberdeen mine is now located—in an easterly direction. The mine Mr. Gilson was operating is indicated on the map here as the Aberdeen Mine in section 10, township 13 south, range 10 east. The original Aberdeen Mine was opened up in Cordingly Canyon. Some other mine took the name of Aberdeen afterwards. The Kenilworth people call it Aberdeen coal. The Aberdeen Mine refers to two different mines. I believe it was the middle vein that Mr. Gilson was operating in there at that time because he was making a specialty of blacksmith coal. It strikes me from what I know of conditions, it has been a long while ago, but I know that Mr. Gilson said at that time that that was the best blacksmith coal in the west and that it was a small vein, pretty well up on the side hill, so that if I remember correctly, it was the middle vein. At Kenilworth the lower vein is a large vein, something like 20 feet thick. Then there is a small vein. They call it a six-foot vein. It might vary from 6 feet. It might run 6 or 8 along there somewhere, and above that there is another big vein possibly 18 or 20 feet, if my recollection serves me right. The middle vein is the one that Mr. Gilson was working on at that time, which he was calling blacksmith coal, the best blacksmith coal in the western part of the country. He must have been there working that four or five years. I would say anyway until 1895. There has been no change in the topography of the country there since I first knew it in 1900. There has been no geological changes in the way of shifting of strata or earthquakes or upheavals or anything of that sort.

Cross-examination.

By Mr. King:

No sir, the Aberdeen property operated by Mr. Gilson was not what was known as the Milburn entry. The Milburn entry was on the right-hand side of it as you went up and the old Gilson mine was on the left-hand side. We called the Gilson mine a coal mine in those days. It was [fol. 350] just a small opening. There were more than a few wagon loads hauled down to Price. It was what we

call a wagon mine. They had at various places along there pretended to actually mine. Of course, at that time Clear Creek and Sunnyside was not open. It was not comparable to those. It was not a railroad mine. The small vein that Mr. Gilson was working as blacksmith coal was about 6 feet, but the Milburn that lies just across the gulch there was wide enough so that a team could go right into it and load up with coal, inside the seam. I don't think the tunnel in the Gilson property was more than 150 feet. It had no room off from the main entry and was just a prospect hole. These little places where there were croppings of coal on the surface of the escarpment in nearly every instance in that section of the country there had been filed coal declaratory statements and entered accordingly. I first went to Carbon County the first day of February, 1899, and was employed by the Railroad Company as a telegraph operator at Price. I became identified with the coal operations in 1889. Between 1889 and 1899 I had nothing to do with the examination of coal properties through that country. I was up to the Milburn Mine. As to the section you are calling attention to, I was not over any part or portion of it to make an examination with reference to coal conditions between 1889 and 1899. After 1899 I started working for the Utah Fuel Company as an outside foreman. My operations then at Sunnyside did not take me into the actual development conditions of the Utah Fuel Company coal properties under ground. Not at the start. I continued as outside foreman for five years, up until 1904. During those years I personally made a careful examination of a portion of the land shown on plaintiff's Exhibit 2 here in purple. I made examinations in Cordingly Canyon, Dead Man's Canyon, Coal Canyon and Dugout Canyon. I was not with Bob Forrester, geologist of the Utah Fuel Company. Bob told me to go over it. I just had a man as a laborer. At that time I simply went to such little places as I found coal exposed in the veins in the various canyons. At that time I was taking a mining course, a geological course at the time I was there, a correspondence course, Scranton Correspondence School. Up to that time I had never operated the business of coal mining or been in the field making examination in connection with known geologists. I had been with a known coal man to determine whether or not from an examination of the escarpment there was any burnt coal.

Nobody can tell how far back the burnt coal went. I did not make an examination of any part or portion of this ground [fol. 351] back there to determine whether or not there were any faults. I did not find any faults in the country. I looked along the escarpment, which is the place to look for faults. The escarpment there is clear on top of the mountain. At that time I didn't go back of the escarpment to the north taking out at any one of these canyons one or two miles to discover the conditions on top of the mountain. Section 3 in township 13 south, range 10 east, seems to be above the escarpment. Therefore, I didn't go up there and make an examination as to whether or not there was an outcropping of coal on each one of the 40's in that section. No sir, I didn't go so far back of this escarpment as that. I don't think that I went on to section 1 in the same township and section to determine whether or not there was any coal discoveries on either one or any of the 40 acres within that section at that time. So that I would not know whether or not this portion of section 26, a portion of 27, a portion of 22 and a portion of 35, all of 35, all of 34, all of 33 in township 11 east, 12 south, contained indications of coal upon the surface except from my knowledge of geology. Judging from the escarpment. There is no outcropping on the ground there. I never sank any diamond drill on any portion of the ground shown by this Ex. 2, or drove any shafts. I never observed prior to 1904 any drill holes upon any 40 within the ground I have indicated. I knew that between 1889 and 1899 from my own observation then as a telegraph operator in that country that there was not a property being operated between Castle Gate and Sunnyside, a distance of between 35 and 40 miles. I knew that the first mine they afterwards attempted to develop in that section of the country was at Kenilworth, beginning along about 1903 and 1904 and 1905, and coming into active production about 1907. That is approximately a mile and a half away. I had nothing to do with the development of the Kenilworth property. I know the course of the vein inside of the workings only from the map. Prior to 1907 I did not, because the vein was not opened up to any extent. We knew it was coal land, of course. In places it was burnt out and in other places there was coal exposed right at the surface, yes, for a very short distance they ran into burnt coal. In one place they had to go nearly a thousand feet in Kenil-

worth before they got into any coal, and in another place they went right into the coal.

It is impracticable to sink a shaft on the top of the mountain. If you did do it, you couldn't tell from any observation upon the surface whether you were going to [fol. 352] catch any coal or not back two miles from that escarpment. Yes, you know the coal is under there. Yes sir, you would know what depth it is. Yes sir, we determine the faults by an observation on the surface. I think that prior to 1904 the Government of the United States made an examination to determine the nature of the fault of the deposit that we have today for coal. In this particular section I know there was a bulletin pending, and I am not sure whether it was in 1904 or 1906, but it is around that time. The number of the bulletin is 316, and it is by J. A. Taft. I believe the Taft investigation was made in 1906. I believe there was a bulletin published in 1904. I couldn't give you the number of it or tell you who it was by. Whatever the time of it was, it embraces that particular ground. I did not assist in any investigation before 1906. In 1906 there was a little development in Bull Hollow, because I was there at that time, and I think some of it had been done a year or so prior to that time. By development, I mean prospect holes. The years that I have been in Carbon County, there has not been any developed property, producing property in Coal Canyon. There has been a wagon mine in Dead Man's Canyon. The Wellington produced enough for the town of Price. No sir, not a railroad mine. And that is one where it comes out on the escarpment. Going into Cordingly Canyon there is one or two little veins. There is the little Milburn and Gibson operations. Those are not on the escarpment. There were places where it was tunneled into 200 feet. I would say the tunnel would be 300 feet, then there was one section of it on the contrary that was entirely dug out there so that it looked as though there had been 10,000 tons of coal removed. It looked as though there was half an acre dug up. The extent of that tunnel was about 300 feet. That has been so all during the period of possibly 35 years. That is within a mile and a half of the ground embraced in this controversy, and the same is true of the Gibson property. From the ground

that is in controversy it is a distance of at least from 20 to 25 miles from the nearest point to Sunnyside.

Cross-examination.

By Mr. Wilson:

Mr. Lacy: We make the same objection to the cross-examination of the witness as made to the other witnesses, that it is concluded by the judgment in the former case.

I am at present employed as a deputy sheriff. I first went into this country in 1889 at Price. I had not lived in that vicinity prior to that time. I was a telegraph operator for five years. At that time I was not studying [fol. 353] geology and did not undertake to acquaint myself with the geological formation of the surrounding country. In 1899 I commenced to work for the Coal Company. I had no connection with the Coal Company prior to that time. Between 1894 and 1899 I had a ranch down at Price, a ranch and prospecting work. Prospecting for coal and gilsonite and the different hydro-carbons that are around in that country. Part of the time covering a period of five years, I prospected for coal in that vicinity. It is not exactly true that any time I thought I knew of a piece of ground that might be valuable for coal, I was looking for it and went out to investigate it. Of course I knew what ground contained coal and what didn't contain coal. I never said that I didn't need to prospect. I just didn't do it. I was in a position where I could go right out and locate coal when I wanted to. I did not locate any in that five years. I still have my Government rights to locate coal, at the end of the five years. I knew coal land that was worth locating during that time. Conditions were a little different than they are now. The Utah Fuel Company and the Denver and Rio Grande were all practically one company, and it is pretty hard for an independent operator to do anything with a coal mine. That is the best reason I care to give for not locating. Up until 1899 it would be pretty hard to finance the locating of that land as coal land. I knew all of the time that this was good coal land that is designated here in purple. I got that knowledge first, I would say, about 1890 or 1891. From 1890 to 1891, I want the court to understand that I knew

all of the land that is described in purple was coal land. By coal land I mean land that is underlaid with coal in commercial quantities—chiefly valuable for coal.

Bob Forrester sent me out to look for coal land between 1900 and 1905. He was employed by the Utah Fuel Company. That was between 1899 and 1905. I couldn't give these dates any more definitely that that. I worked for Bob Forrester and the Pleasant Valley Coal Company as an outside foreman. I was engaged for probably a week looking for coal land for the company up and around that escarpment. I did not locate any land. I will qualify my statement. I was out to get some samples of coal from the operations and prospect holes that had been made along the escarpment. If I made the statement that I was looking for coal lands for the purpose of locating it, I want to qualify. I never went out there looking for coal lands to locate. I didn't need to look for it. I knew where it was all the time. Up here in Bull Hollow I knew that. I knew about a tunnel being driven in there [fol. 354] to the extent of about 900 feet. They didn't find any coal in it—drove it into burnt coal. They abandoned it. That was 1906, I believe, or 1907. That was about two miles from any of this land in purple. I do not know from actual experience whether there has ever been a pound of coal dug in any of the land designated in purple on Exhibit 2. I believe that a little above the outcrop, if not right on the escarpment, there had been coal dug from it. I think I have told my knowledge of what coal there was. No, it is not a matter of assumption with me with reference to that land rather than knowledge. I am going to say it is knowledge—actual knowledge. It comes from experience. When coal is made it is laid down from the organic remains of vegetable matter and it covers a very large area of country as a usual thing. It is laid down in horizontal beds as water would lay it down, probably as level as water could make it, and later on it might be tilted up to any angle, even to a ninety-nine degree angle. I am testifying now from experience. I was never around when any of it was tilted up. It is personal knowledge. I know how that coal is laid down, not because I was there; I have that knowledge of geology. I get it out

of books, the same way you get your law knowledge. I say from actual experience that this land contains coal—it is from reading and studying geology and upon personal observation as well as development of coal mines. I never developed any coal mines on any of this land. I never dug a pound of coal out of that land. I never saw anybody else dig coal out of it. I mean the land in purple on Exhibit 2.

Cross-examination.

By Mr. Parker:

I said I was a telegraph operator for five years, from the first day of February, 1889, to July 1895. No sir, I didn't engage in the coal business. I didn't go to work for the Utah Fuel Company until the 19th day of November, 1899. There were no locations on any of this property at the time I took these samples that I know of. I said that I was acting for the Utah Fuel Company when I took the samples. They made no locations in pursuance of my investigation that I know of. They had no other investigators up there besides me at that time. No sir, they didn't undertake to locate any of the land in view of the report that I made to them and the samples that I produced. It didn't prove to be very good coke and coal. No sir, they were not interested.

[fol. 355] Additional cross-examination.

By Mr. King:

Yes sir, from first of July, 1890, down until at least in 1915, the Utah Fuel Company kept and maintained a geological staff, headed by Robert Forrester, and various other geologists and surveyors. They had maps and plats of the property, maps and plats of practically every foot of the territory in Carbon and Emery Counties. I knew that the company had either by coal locations or by purchases made of the state of school sections and various other ways acquired in that section of the country a very large acreage of coal land. I knew that they were in 1896 to 1904 the closest operators to this ground in question, and that thereafter they opened this other mine at Sunnyside nearly 25

miles away, and that this was the next nearest company until the opening of the Independent Company along in 1905 or 1906. I knew that the Utah Fuel Company did not take an acre of the ground in that vicinity. Yes sir, that is my recollection. I mentioned a bulletin which I think was issued in 1904. I could not tell by whom it was written or what geologist prepared it or what it referred to in respect to this ground. I couldn't give offhand one solitary statement with reference to the contents of that bulletin with reference to the ground in controversy.

Redirect examination.

By Mr. Lacy:

Yes sir, that Government publication by the United States Geological Survey, which you hand me, calling my attention to pages 294 to 296 is the publication that I have reference to. This is dated 1905. Yes sir, this is the book.

Cross-examination.

By Mr. Wilson, interposing question:

This book is contributions to economic geology 1905 by S. F. Eamens and E. C. Eccles, geologists in Chicago, published by the Government Printing Office in 1906. I have a copy of this bulletin at home. I wouldn't say just when I got it. All I pretend to say is that I received a copy of that book. Yes sir, I got a copy of it shortly after it was published. I suppose I got that in 1906; that is the date of the publication there. I never got any separate and independent sheets from the book. The book I got was not like that. It didn't have that cover on it at all. It had a paper cover. I am able to identify it by the publishers of it. However, that is the bulletin that I referred to as having been published before the Taft bulletin. No sir, it is not from that bulletin that I got my information regarding [fol. 356] these lands. I got my information in the first place in regard to those lands from personal observation. The book did influence me to the extent of all books. All knowledge interests me. It confirmed my belief with reference to these lands. I knew all about it before then. It was just cumulative evidence.

HARRISON E. JENKINS, produced as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Lacy:

I reside in and have been a resident of Salt Lake City 53 years. I recall the matter of the organizing of the Carbon County Land Company, the incorporation of that company. I think I was one of the incorporators of that corporation. My recollection of it is a little indefinite. I think perhaps I didn't own any of the stock on the organizing of that company. I held a few qualifying shares. From my impression of the matter I know I didn't own any in my own right. I believe that is likely that I owned some of it as a trustee or the major portion of it as a trustee. I have not refreshed my memory in a long while on that. I think it is true that I held 95,000 and some odd shares out of 100,000 shares.

Q. Did you hold them as trustee for the company or for whom were you holding them; whom did you represent?

Mr. King: I object to that as incompetent, irrelevant and immaterial for any purpose in this case.

The Court: Do you claim something for that?

Mr. Lacey: It is offered for the purpose of showing that the organizers of the Carbon County Land Company were the same parties to whom this land was certified. Mr. Milner collected up these certificates and organized the company, Mr. Stanley B. Milner.

The Court: Can't you men admit that in the record?

Mr. Wilson: I think that is true.

The Court: Isn't it true that this company was a Milner corporation?

Mr. King: I don't know just exactly the extent it was owned by any particular individual, that I don't know. I never had occasion to go into it.

[fol. 357] The Court: This witness probably knows whether he held the stock for the benefit of the Milners or not.

A. It has been a long time. My connection with it was through Mr. Stanley B. Milner. That is all I know about

it. My whole connection with the Carbon County Land Company was with or through Mr. Milner at that time.

Q. Did you file or take up some coal lands about that time for Mr. Milner?

Mr. King: You don't claim by that it is part of the lands in question here.

Mr. Lacey: No, it was taken up by coal declaratory statements adjoining the land in question here in 1903.

Mr. King: May it please the court, I object to that as incompetent, irrelevant and immaterial.

Mr. Lacy: I am merely offering it to show the knowledge of the parties concerning the character of this land in the immediate vicinity and some of the sections between this land and the coal outcrop.

The Court: It might, if it was in the same locality and the same outcrop. I will let it go into the record if counsel claims it is worth anything.

Mr. King: We certainly object to this as incompetent, irrelevant and immaterial.

Which objection was overruled by the court and exception noted.

Mr. Gibson's attention is called to Government's Exhibit 19.

I haven't any recollection of the document. I don't recognize anything about it. That is a photostatic copy. Yes, I can recognize the signature. I don't write it that way now. I don't recall of ever having written my name in that style. It is probable that I may have made this statement but I don't remember it. I don't recall ever having made that because I don't write that way at all.

(Here Mr. Jenkins was handed the original of the statement from the records of the Land Office.)

This rather perplexes me. I would not be able to identify it, my name in the form it is. I would not be able to say that is my signature.

[fol. 358] Yes, sir, I filed that declaratory statement at the date shown, the 17th day of March, 1904.

Yes, sir, I knew August Pedje in his lifetime. He was an uncle of my wife's. The other members of his family were his wife, Sofia, and I think probably Phillip. My mind is

being as follows: Making house, road and tunnel exposing coal, and I do furthermore solemnly swear that I am not well acquainted with the character of said described land, and with each and every legal subdivision thereof, not having frequently passed over the same; that my knowledge of said land is not such as to enable me to testify understandingly with regard thereto, such information being possessed by my agent; that a non-mineral affidavit is attached hereto sworn to by S. H. Gilson, my duly authorized agent, and Attorney in fact, showing the character of said described land.

Harrison E. Jenkins.

Subscribed and sworn to before me this 17th day of March, 1903, at Salt Lake City, Utah. L. H. Gray, Notary Public.

Power of Attorney

Know All Men by These presents: That I, Harrison E. Jenkins, having applied as aforesaid to enter the above described lands, hereby authorize and empower S. H. Gilson to complete the necessary proof therein, especially to make the required non-mineral affidavit as I am assured and believe that he is well acquainted with the character of each and every legal subdivision of said described land, hereby ratifying and confirming all acts that my said agent shall lawfully do by virtue hereof.

Harrison E. Jenkins.

Witness: L. H. Gray.

Subscribed and sworn to before me this 17th day of March, 1903, at Salt Lake City, Utah. L. H. Gray, Notary Public. My commission expires July 20, 1904. (Seal.)

Non-mineral Affidavit

STATE OF UTAH,
County of Salt Lake, ss:

S. H. Gilson, being duly sworn according to law, deposes and says, that I am the agent and attorney in fact for the applicant herein for Government title to the above de-

[fol. 361] scribed coal land; that I am well acquainted with the character of said described land and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver or copper and that there is not within the limits of said land, to my knowledge any valuable deposit of gold, silver or copper; that the land contains no salt spring or deposit of salt in any form sufficient to render it chiefly valuable therefor; that said land contains large deposits of coal, and is chiefly valuable for coal, so help me God.

S. H. Gilson.

Subscribed in my presence and sworn to before me this 17th day of March, 1903, at Salt Lake City, Utah. L. H. Gray, Notary Public. My commission expires July 20, 1904. (Seal.)

Ex. 54.
L. H. Gray, Land Attorney, Salt Lake City, Utah.
Plat filed Mch. 19/03.

010-2

STATE OF UTAH,
County of Salt Lake, ss:

May 16, 1904.

Personally appeared before me the undersigned who being duly sworn say that they have read the foregoing affidavit of Hanson S. Jenkins, the coal declarent, who has made application to purchase the S. W. ¼ of Section 12, Tp. 13S., R. 10E. and that the statements made therein are true.

A. D. Ferren, Archibald C. Milner.

[fol. 362] Subscribed and sworn to before me this 17th day of March, 1903. L. H. Gray, Notary Public. (Seal.)

(Copy.) C. D. S. 2073. Harrison E. Jenkins, Salt Lake City, March 17, 1903. Ex. 54. G W. C. L. H. Gray, Atty. Filed Mch. 17, 1903.

(Whereupon at this time the further hearing of said cause was continued until Tuesday Morning, April 2, 1929, at 10 a. m.)

C. W. Morse, produced as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

I am a practising lawyer here in Salt Lake City, 72 years of age. I have practiced here 40 years. I was one of the district judges of this Third Judicial District for sixteen years in this state. During part of that time I had charge of the equity division of the court. I retired from the bench the first of January, 1917, and since that time I have engaged in the practice of law in Salt Lake City, Utah. Yes sir, that is my signature to the letter marked Exhibit C. Yes sir, I wrote that letter to you. You called my attention to the letter this morning. I was employed by you to render an opinion in regard to the land considered in that letter, the title to the land. Yes sir, this letter is the opinion I rendered. The employment was in the regular course of business and I was paid for it.

Defendant's Exhibit C was offered and received in evidence over the objection of the plaintiff that it did not tend to prove any defense on the part of the Independent Coal and Coke Company to the action of the Government and was immaterial and irrelevant.

[fol. 363] DEFENDANTS' EXHIBIT C

offered and received in evidence, is in words and figures as follows:

"Ex. C, Deft.

"United States Fuel Company, Kearns Building, Salt Lake City, Utah

Office of C. W. Morse, Attorney

September 14, 1920.

"Mr. M. E. Wilson, Attorney-at-law, city.

DEAR SIR: As requested by you, I have examined and carefully considered the abstract of title handed me to certain coal lands transferred by the State of Utah to the Milner Corporation, together with the transcript of the record in the case of the United States Government v. Truth A. Milner, et al., as well as the letter received by you from Mr. McRoberts relating to this title.

"It appears from this record that the action was brought by the Government to cancel and require the delivery for cancellation to the State of Utah of the contracts which theretofore had been entered into between Truth A. Milner, et al., for the purchase from the State of certain mineral lands, including the lands in question. As a result of the trial of this case in the Circuit Court for the District of Utah, a decree was entered quieting the title of the United States to these lands and requiring the delivery for cancellation of the contracts of purchase. Coupled with this order was an injunction enjoining the defendants and all persons claiming through or under them, from asserting or claiming any right, title or interest in and to these lands or any of them, and I note that Mr. McRoberts suggests that possibly this injunction, unless modified, would constitute an obstacle to the procuring of title by the Milner Corporation from the State of Utah under the compromise arrangement made in the early part of this year. The effect to be given to the langauge employed in an injunctive decree must always be determined with reference to the matter under consideration in the proceeding in which the injunction is issued. The matter under consideration by

the Circuit Court was the claim of title by Milner and others under and by virtue of the contracts of purchase en- [fol. 364] tered into with the State of Utah, and in my opinion the extent of the prohibition was to restrain and enjoin them from at any time, either directly or indirectly, through themselves or other parties, claiming by virtue of

those contracts any right, title or interest in the land, and would not constitute a disqualification which would render them unable to procure and hold title to these lands, or some of them, by any valid means through which they might be able to procure the same, after the entry of said decree. I am therefore of the opinion that if the title of the State of Utah in 1920 was valid, its patent to these lands would transfer a good title to the Milner Corporation.

"My analysis of the facts as disclosed by the transcript and the decree, and the opinion of the Circuit Court of Appeals in the Milner Case, is, that if the same facts had been presented in a proceeding brought by the United States Government in a court having jurisdiction against the State of Utah for the purpose of cancelling the certification of these lands and annulling the title acquired by the State under such certification, the title of the State would have been cancelled and annulled; in other words, my view is that the title acquired by the State under the certification by the Secretary of the Interior was merely a voidable title, which if attacked seasonable in the proper court by proper proceedings, would be declared void.

"I am not, however, prepared to say that it is my opinion that the title acquired by the Milner Company under the patent issued by the State of Utah during the early part of this year, is not a marketable title. In the first place, the Department of Justice of the United States in 1907 elected, or rather determined to proceed against the persons who had contracted for the purchase of this land from the State of Utah, and procured the cancellation of their contracts upon the ground that they had secured the selection and certification of these lands through fraud, rather than to proceed against the State of Utah for the purpose of procuring a cancellation of the certification and for the purpose of divesting the State of the title acquired by it under

such certification. As indicated by the opinion of the Circuit Court of Appeals, it was conceded by all parties that the State through its officers had been guilty of no fraud and had not knowingly deceived the officers of the Government or attempted to procure the certification of these lands improperly. The only persons whom it was alleged [fol. 365] committed any fraud were Milner and his associates, and the action of the officers of the United States from the time of commencement of the proceedings against Milner to the present date have all been in accord with the view that the State of Utah ought not to be disturbed in the title acquired under the certification from the Secretary of the Interior of these lands.

—2—

"—3—

"I think it may be conceded that the fact of a certification in response to a selection regularly made by the State Land Board under the Statutes of the State and the Act of Congress known as the 'Enabling Act,' by the terms of which lands were granted to the State of Utah and under which the selection and certification of these lands were made would pass without other act on the part of the Government, the legal title to the State; no further act is required and no patent is issued by the Government, so that on the face of this record the legal title appears to be in the State of Utah without any disposition manifested on the part of the officials of the United States Government to disturb or question this title, and while the title at the time transferred by the certification was voidable, I think we may reasonably expect that no effort will be made to set aside this title. Under the Act of March 3rd, 1891, suits by the United States to vacate and annul any patent theretofore issued, could only be brought within five years from the passage of the Act, and suits to vacate and annul patents thereafter issued, could only be brought within six years after the date of the issuance of such patents. If I am correct in the assumption that the selection by the State Land Board and the certification under such selection by the Secretary of the Interior passes the title and is the equivalent of the issuance of a patent, then I think we may safely say that the Statute of Limitations above referred

to would inure to the benefit of the State of Utah or any one holding title under it to these lands.

"The question as to whether the officers of the Department of Justice may at any time hereafter undertake to disturb this title, and the question as to whether it would be held that the title of the State, acquired as it has been, would come within the provisions of the Statute of Limitations above referred to, cannot in advance be determined, and should your clients determine to purchase this land, [fol. 366] they must take the chances of an adverse answer to these questions, which in my judgment are quite remote.

"Yours very truly, C. W. Morse."

My recollection is that I gave this matter quite considerable time and consideration, and my opinion was rendered in the best of faith.

Whereupon the patent from the State of Utah to the Carbon County Land Company, dated February 10, 1920, was offered and read in evidence by the plaintiff, which offer was joined in by the counsel for the Independent Coal and Coke Company, in words and figures as follows:

GOV'T EXHIBIT 20

Copy

Form No. 69—100-1-17

No. 12078

To all to whom these presents shall come, Greeting:

Whereas, Carbon County Land Company, a Corporation, of Salt Lake City, for the County of Salt Lake, State of Utah, heretofore purchased from the State of Utah, the lands hereinafter described, pursuant to the laws of said State in such case made and provided,

And whereas, the said Carbon County Land Company, a Corporation, has paid for said lands, pursuant to the conditions of said sale, and the laws of the State duly enacted in relation thereto, the sum of Five Hundred Fifty-Six Thousand Four Hundred Twenty Eight ($556,428.00) Dol-

lars, and all legal interest thereon accrued, as fully appears by the certificate of the proper officer, now on file in the office of the Secretary of State of the State of Utah;

Now therefore, I, Simon Bamberger, Governor, in consideration of the premises, and by virtue of the power and authority vested in me by the laws of the State of Utah, in such case made and provided, do issue this patent, in the name and by the authority of the State of Utah, hereby granting and confirming in to the said Carbon County Land Company, a corporation, and to its successors and assigns forever, the following piece or parcel of land, situate in the County of Carbon State aforesaid, to wit: The North Half (N. ½) of Section Twenty-six (26); the Southeast quarter (S. E. ¼) and the Northwest quarter (N. W. [fol. 367] ¼) of Section Twenty-two (22); the East Half (E. ½) of Section Twenty-seven (27); all of Section Thirty-four (34); the South Half (S. ½) of Section Thirty-five (35); all of Section Thirty-three (33) in Township Twelve (12) South Range Eleven (11) East, Salt Lake Meridian. Also all of Section One (1), all of Section Three (3), the North Half (N. ½) of Section Ten (10) and North Half (N. ½) of Section Eleven (11), the North Half (N. ½) of Section (11), the North Half (N. ½) and the Southeast quarter (S. E. ¼) of Section Twelve (12), the East Half (E. ½) of the Northeast quarter (N. E. ¼) of Section Fourteen (14) in Township (13) South, Range Ten (10) East, Salt Lake Meridian; also Lot (1), the Northeast Quarter (N. E. ¼) of the Northwest Quarter (N. W. ¼) the Northeast quarter (N. E. ¼), the North Half (N. ½) of the Southeast quarter (S. E. ¼), the Southeast quarter (S. E. ¼) of Section Seven (7), Lots One (1), Two (2), Three (3), the Southeast quarter (S. E. ¼) of the Southeast quarter (S. E. ¼) of Section Three (3), in Township Thirteen (13) South, Range Eleven (11), Salt Lake Meridian containing Five Thousand Five Hundred Sixty-Four and 29/100 (5564.28) acres according to the said certificate.

To have and to hold the above described and granted premises into the said Carbon County Land Company, a Corporation, and to its successors and assigns forever, subject to any easement or right of way as may have been established or acquired according to law, over the same or any part thereof and subject also to all rights of way for ditches, tunnels and telephone and transmission lines that

may have been constructed by authority of the United States.

In testimony whereof, I have hereunto set my hand and caused the great seal of the State of Utah to be hereunto affixed.

Done at Salt Lake City, this 10th day of February in the year of our Lord, One thousand nine hundred and twenty and of the independence of the United States of America, the one hundred and forty-fourth, and in the 25th year of the State of Utah.

(Signed) Simon Bamberger.

By the Governor:

(Signed) Harden Bennion, Secretary of State.

(Signed) Arthur Kuhn, Secretary of the State Board of Land Commissioners. (Great Seal.)

Recorded Patent Book 25, Page 84. Certificate of Sale No. S 4588-5136-7174-8042-9564 modified.

[fol. 368] STATE OF UTAH,
County of Salt Lake, ss:

I, J. T. Oldroyd, Executive Secretary of the State of Utah, hereby certify that the foregoing is a full, true and correct copy of Patent No. 12078, as compared with book 25, page 84, Record of Patents in my office.

In witness whereof I have hereunto set my hand and affixed the official seal of the said State Board of Land Commissioners on this 2nd day of April, 1929, at Salt Lake City, Utah.

J. T. Oldroyd, Executive Secretary, State Land Board. (Government Seal of State of Utah State Land Office.)

The Arrow Press, 62 W. Second South, Salt Lake. 35881.

(Government's Exhibit No. 21, offered and received in evidence, is in words and figures as follows:)

Ex. 21, Gov't. Plff.

$100,000.00

Salt Lake City, Utah, January 2, 1920.

On or before January 2, 1930, for value received, the Carbon County Land Company promises to pay to the State of

Utah, the sum of One Hundred Thousand ($100,000.00) Dollars, with interest thereon from and after January 2, 1925, at the rate of five per cent per annum, payable annually. Both principal and interest payable at the office of the State Board of Land Commissioners in Salt Lake City, Utah, in lawful money of the United States of America. If any part of the principal or interest is not paid when due, it shall bear interest at the rate of eight per cent per annum, both before and after judgment, and if default be made in the payment of interest, or any part thereof, the principal shall, at the option of the legal holder or holders hereof, become due and payable at once within notice, and in case of collection by foreclosure suit or otherwise, the maker hereof agrees to pay a reasonable attorney's fee and court costs.

Both principal and interest are secured by a mortgage of even date herewith, on 5564.28 acres of land of the Carbon County Land Company, situated in Carbon County, Utah.

Carbon County Land Company, by A. C. Milner, President. By E. Stanley Pratt, Secretary. (Seal.)

$200,000.00.

Salt Lake City, Utah, January 2, 1930.

[fol. 369] On or before January 2, 1940, for value received, the Carbon County Land Company promises to pay to the State of Utah, the sum of Two Hundred Thousand ($200,000.00) Dollars, with interest thereon from and after January 2, 1925, at the rate of five per cent per annum, payable annually. Both principal and interest payable at the office of the State Board of Land Commissioners in Salt Lake City, Utah, in lawful money of the United States of America. If any part of the principal or interest is not paid when due, it shall bear interest at the rate of eight per cent per annum, both before and after judgment, and if default be made in the payment of interest, or any part thereof, the principal shall, at the option of the legal holder or holders hereof, become due and payable at once without notice, and in case of collection by foreclosure suit or otherwise, the maker hereof agrees to pay a reasonable attorney's fee and courts costs.

Both principal and interest are secured by a mortgage of even date herewith on 5564.28 acres of land of the Carbon

entirely uncertain as to whether they filed any coal declaratory statements. I am not quite sure whether I requested them to file coal declaratory statements. I think they were filed.

Q. You recall paying them for this at the time they filed those coal declaratory statements?

Mr. Wilson: I object to that on the ground already stated. I think it is wholly immaterial to this case and to any issue in it.

Mr. Parker: The same objection. The State wants to further object to the introduction of this testimony as incompetent, irrelevant and immaterial because the Government admits in its pleadings that the State was not conscious of any wrongdoing in this matter, so far as it is concerned.

The Court: I told you that I intended to hold Mr. King as bound by that original judgment insofar as his rights in this land in the original contract is concerned.

Mr. Lacy: If that goes as to the State of Utah that these lands were coal lands?

The Court: I won't hold that. I am not going to hold that as to the State of Utah.

The objection is sustained.

Cross-examination.

By Mr. King:

The Hira[illegible]E. Booth referred to was formerly United States Atto[illegible].

[fol. 359] GOVERNMENT'S EXHIBIT 19

offered and received in evidence, is in words and figures as follows:

"B." KRT

United States Department of the Interior, General Land Office, Washington

March 20, 1929.

I hereby certify that the annexed copy of Coal Declaratory Statement No. 4073, Salt Lake City, Utah, is a true

and literal exemplification of the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

D. K. Parrott, Acting Assisting Commissioner of the General Land Office. (Government Seal of United States General Land Office.)

5594—The Skelton Pub. Co., Provo, Utah. 2-73.

(Copy) 010-1

Coal Declaratory Statement

In the United States Land Office, Salt Lake City, Utah

Prior Possession, With Power of Attorney and Non-miner Affidavit

74 W. 7th South

STATE OF UTAH,
County of Salt Lake, ss:

I, Harrison E. Jenkins, whose Post Office address is Salt Lake City, Utah, do solemnly swear that I am over twenty-one years of age and a native born citizen of the United States, born in Utah; that I never have, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States and I do hereby declare my intentions to purchase, under the provisions aforesaid the S. W. 4 of Section 12, in Township 13S. of Range 10E. S. L. M., of lands subject to sale at the district land office at Salt Lake City, Utah, and that I came into possession of said tract through my agent on the 21st day of January, 1901, and I have ever since remained in actual possession continuously through my said agent; that through said agent I have located and opened a valuable mine of coal thereon and have expended through and by [fol. 360] him in labor and improvements on said mine the sum of 1600.00 Dollars, the labor and improvements

County Land Company, situated in Carbon County, Utah.
Carbon County Land Company, by A. C. Milner, President. By E. Stanley Pratt, Secretary. (Seal.)

$256,428.00.

Salt Lake City, Utah, January 2, 1920.

On or before January 2, 1950, for value received, the Carbon County Land Company promises to pay to the State of Utah, the sum of Two Hundred Fifty-six Thousand Four Hundred Twenty-eight ($256,428.00) Dollars with interest thereon from and after January 2, 1925, at the rate of five per cent per annum, payable annually. Both principal and interest payable at the office of the State Board of Land Commissioners in Salt Lake City, Utah, in lawful money of the United States of America. If any part of the principal or interest is not paid when due, it shall bear interest at the rate of eight per cent per annum, both before and after judgment, and if default be made in the payment of interest, or any part thereof, the principal shall, at the option of the legal holder or holders hereof, become due and payable at once without notice, and in case of collection by foreclosure suit or otherwise, the maker hereof agrees to pay a reasonable attorney's fee and court costs.

[fol. 370] Both principal and interest are secured by a mortgage of even date herewith on 5564.28 acres of land of the Carbon County Land Company, situated in Carbon County, Utah.

Carbon County Land Company, by A. C. Milner, President. By E. Stanley Pratt, Secretary. (Seal.)

Whereupon, after calling attention of the court to the Taft Bulletin No. 316, published by the Geological Survey of the Department of the Interior of the United States, referred to in evidence, the plaintiff rested its case, and the following testimony was introduced upon behalf of the defendants.

OFFER IN EVIDENCE

(Letter, W. A. Richards, Commissioner, to Secretary of the Interior)

"Department of the Interior, General Land Office,
Washington, D. C.

September 18, 1905.

"The Honorable the Secretary of the Interior.

"Sir: I have the honor to acknowledge the receipt, by your reference, September 7, 1905, for early report with recommendation, of a letter from the Director of the Geological Survey quoting a letter from Mr. Joseph A. Taff, geologist detailed to make an investigation of coal lands in Utah, as follows:

"I have been in Utah now three weeks engaged in the investigation of coal lands in cooperation with Mr. G. E. Hair, Special Agent of the General Land Office, and I find the following conditions, which, without reasonable question, are subject to, and demand investigation and action by the Department of the Interior.

"The citizens have applied to purchase the lands subject to investigation, either as grazing or coal lands, and the sales are withheld until it is determined whether or not they contain commercially valuable coal. If these lands do not contain coal, they are the property of the State of Utah, and are subject to sale at not exceeding $2.50 per acre. If [fol. 371] they contain coal, they belong to the United States and are valued at $15 or $20 per acre, depending upon whether they are more or less than fifteen miles from operated railroads.

"With these preliminary statements in regard to relations of State and Government lands, I beg to inform you that there is a ruling in force in the State, promulgated by a commissioner of the General Land Office, that lands cannot be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres proposed for sale. To this rule the local United States Land Office and State Land Board have been and are now subject.

"Under the existing conditions of the coal deposits as I find them, such a ruling prevents the proper classification of coal lands, prevents the sale of such lands desired by

honest would-be purchasers in tracts of sufficient size to warrant profitable exploitations, has caused large areas of very valuable coal lands to be classed as grazing land and sold at $1.50 per acre, and will cause the continued sale of such lands if it remains in force.

"Since a land subdivision may lie in any altitude with respect to a contiguous coal outcrop, a forty-acre tract or a section of land may be within a few hundred feet of exposed coal and so situated that coal could be mined from the entire tract, and yet it would be impossible to find coal in the area before purchased.

"I respectfully suggest that the attention of the Secretary of the Interior be brought to this matter, and most earnestly request that he cause a ruling to be issued permitting the classification of lands as coal lands in legal subdivisions as established by the United States Surveys to distances of one mile beneath the surface from the know outcrops of commercially valuable beds of coal.

"The purpose of this letter is to secure a modification of the rule 'that lands cannot be classified as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres proposed for sale.'

"Mr. Taff also states that 'to this ruling the local United States Land Office and State Land Board have been and are now subject.'

[fol. 372] "By the act of July 16, 1894, (28 Stats., 109), the State of Utah was granted certain sections of land for common school purposes with indemnity for losses in place and grants in quantity to be selected for public educational and benevolent purposes.

"With respect to the character of lands to be taken by the State of Utah under these various grants the rule is the same as is enforced with respect to similar grants in other states, namely, that lands known to be mineral at date of admission of the State if previously surveyed (or at date of subsequent survey) do not pass to Utah under a grant of school sections (State of Utah v. Allen et al., 27 L. D. 53), and selections for indemnity or in satisfaction of specific grants in quantity, as for university and like purposes, do not become effective until approved by the Secretary of the Interior, and if at any time before he approved a selection list it be determined that the lands contained therein or any part of them are mineral in character they

are not subject to selection under the law, and it becomes his duty to cancel the selection in whole or in part as the facts may warrant. Edward B. Jones v. the State of Utah, departmental decision of August 31, 1904 (not reported). Likewise mineral lands are withheld from appropriation by individuals under the agricultural laws.

"Coal is held to be a mineral (see T. P. Crowder, 30 L. D. 92, and cases therein cited), and the practice governing the adjudication or ordinary mineral cases is equally applicable to cases affecting coal lands. The matter referred by Mr. Taff is not new to this office. From time to time the special agents of this office located in Utah and elsewhere have been reporting that large quantities of valuable coal lands were being taken by the States and Territories as indemnity for loss of school sections or in satisfaction of their congressional grants and by individuals under the various agricultural laws. In each case brought to the attention of the office an investigation has been directed whenever the showing justified and a hearing ordered to determine the true character of the lands involved. In many instances the special agents and private individuals interested in having these lands held to be mineral in character have failed to make out a case because of the necessity under the practice of the Department of showing the existence of a deposit of coal upon the particular tract in controversy. It has been insisted that certain lands selected by the State or entered by individuals under the agricultural land laws are [fol. 373] valuable coal lands notwithstanding the impossibility of showing the existence of mineral thereon. This belief is apparently based upon the fact that surrounding lands are known to be valuable coal lands and that the geological formation of the vicinity and of the particular tract in question is such as to make it almost a certainty that the coal measures underlie such lands. It would appear that Mr. Taff has found such conditions existing if one may judge from what he states in his letter.

"Sections 2347 to 2352, U. S. Revised Statutes, provide for the disposition of such mineral lands as contain deposits of coal, and in his proofs the claimant is required to show that the land 'contains large deposits of coal and is chiefly valuable therefor,' or that he has 'opened a valuable mine of coal thereon,' or that the same is 'chiefly valuable for coal.' In ex parte cases the affidavits of the parties are

deemed sufficient but in contested cases more specific proofs are required as to the character of the land and the evidence sought in the same as with respect to cases affecting other classes of minerals. The decisions of the courts and of the Department have been numerous as to what constitutes mineral land. In the case of Davis' Adm'r. v. Wiebold (139 U. S., 507,) it was said that—

"The exceptions of mineral lands from pre-em-tion and settlement and from grants to states for universities and schools, for the constructions of public buildings and in aid of railroads and other work of internal improvement, are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify the expenditure for its extraction, and known to be so at the date of the grant.

"See also on this point United States v. Iron S. M. Co., (128 U. S. 673).

"In the case of Castle v. Womble (19 L. D. 455), the Department says substantially:

"It is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine the land is mineral in character and will be awarded the mineral claimant.

[fol. 374] "These cases control the practice at this time. With respect to coal it is said in the case of Colorado Coal & Iron Co. v. United States (123 U. S., 307):

"It is not sufficient to constitute 'known mines' of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields of greater or less extent and value as shown by outcroppings. To constitute the exemption contemplated by the pre-emption act under the head of 'known mines' these should be upon the land ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine than for agricultural purposes.

"These decisions have been selected from numerous others as specifying the conditions under which land may

be held to be mineral in character. Another long line of decisions state that the mineral must be shown to exist upon the particular tract of land under investigation. For example, proof of the mineral character of land must be the actual production of mineral thereon, not that adjoining lands are of that character nor that the land in question may hereafter develop mineral. Commissioners of Kings County v. Alexander (5 L. D. 126). The mere proximity of tracts containing coal does not stamp the land on which no coal has been found as coal land. Scott v. Sheldon (15 L. D., 361). The fact that land lies in a mineral belt and that neighboring tracts contain mineral does not show the land to be of that character. Warren v. State of Colorado (14 L. D., 681). See also John E. Williams (11 L. D., 462). In a line with these was the recent case of San Fernando Oil Co. v. Brady, departmental decision of March 23, 1905, (not reported), in which it was held that the fact that neighboring and adjoining lands contain oil did not constitute the land in controversy mineral land, there being no discovery of oil thereon. See also coal case Murphy v. Ford, departmental decision June 23, 1905 (not reported).

"It will be seen from the decisions referred to that the Department and the courts have always held that there must be an actual discovery of mineral, in some quantity at least, upon the land under investigation before it can be held to be mineral in character. In any case where a discovery of mineral upon the ground has been shown the value and extent of mineral deposits on neighboring tracts may be considered as circumstances tending to show the value of the mineral deposit discovered upon the land involved. See [fol. 375] in this connection Santa Clara Mining Association v. Scorsur (1 L. D., 104); Rucker v. Kinsley (14 L. D., 113); Hamilton v. Anderson (19 L. D., 168) and departmental decision of May 23, 1896, (not reported) in the case of Seifred v. Minnelli.

"In the case of Kern Oil Co. v. Clotfelter (30 L. S., 583), the Department in ordering a hearing on a protest by an oil claimant against a forest lieu selector within it was alleged that the land involved was mineral in character, directed that the evidence—

Bearing upon the mineral character of the land selected should not be restricted to mineral discoveries or developments upon these lands and to their geological formation

but may extend to the discovery and development of mineral on adjacent lands and to their geological formation.

"The hearing was duly had and the case adjudicated by departmental decision (33 L. D., 291), but it appeared from the testimony submitted that discoveries of oil were made upon the land in controversy prior to the date of forest lieu selection and therefore there was no decision as to whether geological formation of and discovery and development of mineral on adjacent lands and the geological formation of the particular tract under consideration would have been sufficient to determine its classification in the absence of an actual discovery of oil thereon. In the case of Rucker v. Knisley (14 L. D., 113), above referred to, it is held that in determining the character of land alleged to be valuable for coal the extent of the deposit might be shown by the testimony of geological experts and practical miners taken in connection with the actual production of coal.

"Referring to the statement in Mr. Taff's letter, it is not the rule that 'commercially valuable coal must be exposed in each legal subdivision of forty acres proposed for sale.' In ex parte cases where a greater quantity of land than forty acres is applied for, and it is shown that a valuable deposit of coal has been disclosed thereon, the presumption is that the whole of the tract is mineral land. When an application is contested by an agricultural claimant, the coal claimant is found entitled not only to the 40-acre tract on which a valuable deposit has been exposed, but to all 40-acre subdivisions applied for, which the evidence indubitably shows to contain coal veins of value although the indications on the tract are meagre. The coal cases hereinbefore referred to warrant the construction, but the case of Hamilton v. Anderson (19 L. D., 168) is specific. This was a case [fol. 376] where several 40-acre subdivisions, not in the same quarter section, were involved. Among other things the Department said:

"The evidence shows conclusively that a valuable mine of coal has been opened on the S. E. 4 of the S. E. 4 of Section 31, and the decision appealed from is concurred in, in so far as your office holds Anderson's pre-emption declaratory statement for cancellation as to that 40-acre tract.

"It further appears that said opening on the S. E. 4 of the S. E. 4 is a tunnel about ten feet from top to bottom, five

feet of which is good merchantable coal. The mouth of this tunnel is only one hundred and fifteen feet from the line of the S. E. 4 of the S. W. 4 of Section 32. The entry has been driven at the date of the hearing a distance of about 35 feet, in a straight line directly towards this last named tract. The coal has increased in thickness as the opening has been extended, and the quality has improved.

"The rule of the Department, undoubtedly, is that the land must appear mineral in character 'as a present fact' and from actual production of mineral. Rucker et al. v. Knisley and cases cited (14 L. D., 113), but it does not follow, and has never been held by the Department, that there must be an actual development of coal on each 40-acre subdivision of the 160 acres for which entry is allowed under the mining laws.

"See also in this connection McWilliams v. Green River Coal Association (23 L. D., 127).

"Summing up, it appears that applicants for the public lands in the State of Utah, whether the State or private individuals, are subject to the same rules and regulations respecting the character thereof as are applicants elsewhere; that under the practice as laid down by the Department and the courts, a tract of land must be shown to contain deposits of mineral within its borders before it can be considered as mineral in character and that a discovery having been made thereon the geological formation of the land and of surrounding lands and the discovery and development of mineral thereon may be considered as circumstances tending to prove that all the particular tract applied for is mineral land. In connection with this the rule laid down in the case of Castle v. Womble, supra, is taken into consideration and there does not appear to be any decision of the Department or of the courts which warrants the sale of public land under the mining laws or which warrants the adjudication of a tract of land as mineral unless there shall have been an actual discovery of mineral upon the land in question.

[fol. 377] "In Mr. Taff's letter there is no such showing, in my opinion, as would warrant the Department in modifying the practice to the extent of holding, as he appears to desire, that lands may be adjudicated to be mineral lands solely upon the geological formation thereof and of *the*

geological formation and of discoveries and development of mineral on adjoining lands.

"He refers to no specific case as furnishing a substantial reason for such modification of the practice.

"Any changes in the general practice would be far-reaching in its effects, and it is recommended that the detailed report treating of specific tracts of Messrs. Taff and Hair be awaited and that when filed it be given consideration with a view to such action on the point raised as may then seem just to the government, the State and to individual claimants.

"The papers referred are herewith returned.

Very respectfully, W. A. Richards, Commissioner."

DEFENDANT'S EXHIBIT D

offered and received in evidence, is in words and figures as follows:

Ex. D., Deft.

The State of Wyoming, Office of the Secretary of State

UNITED STATES OF AMERICA,
State of Wyoming, ss:

I, F. E. Lucas, Secretary of State of the State of Wyoming, do hereby certify that the annexed copies of the Articles of Incorporation and Certificates of Amendment thereto, of the Independent Coal and Coke Company, have been carefully compared with the originals, filed in this office on the twenty-second day of October, A. D. 1906, at 9:00 o'clock A. M., on the twenty-sixth day of January, A. D. 1914, at 10:00 o'clock A. M., and on the sixth day of October, A. D. 1920, at 9:00 o'clock A. M., respectively and are full, true and correct copies of the same and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Wyoming.

Done at Cheyenne, the Capital, this fifth day of May, A. D. 1925.

F. E. Lucas, Secretary of State, by H. M. Symons, Deputy. (Seal.)

[fol. 378] Articles of Incorporation of the Independent Coal & Coke Company

Know all men by these presents that we, the undersigned, do hereby associate ourselves together for the purpose of forming a corporation under the laws of the State of Wyoming, and to that end we certify and declare as follows.

Article I

Said corporation shall be called and known by the name of Independent Coal and Coke Company and shall exist for a period of fifty (50) years from the date hereof unless sooner dissolved or disincorporated according to law.

Article II

The principal place of business of said corporation in the State of Wyoming shall be at Evanston, in the County of Uintah, said state. The principal place of business outside of said State of Wyoming shall be at Salt Lake City, in the County of Salt Lake, State of Utah. The corporation may have such other offices either within or without the State of Wyoming as may be established by the Board of Directors at any of which offices meetings of the Board of Directors may be held.

Article III

The object, business and pursuit of this corporation is and shall continue to be to carry on a general coal and coke business, and in so doing to acquire and hold by purchase, location, lease, bond, exchange, or otherwise, and to sell, lease, or otherwise dispose of coal lands and other real estate; to prospect, explore, develop and operate coal mines and coal lands; to carry on generally a business of coal mining, coking, treating, preparing for market, manufacturing, buying, selling, exchanging and otherwise purchasing and dealing in coal, coke, oil and all of the by-products therefrom, and by whatever process the same can be or may hereafter be produced; to build, own and operate coke ovens, tramways, electric or steam railways, wagon roads, or other means of transportation; to build, own and operate telephone and telegraph lines or any other means of communication; to engage in, own and conduct a general mer-

cantile business, hotel, boarding house or other branches of trade necessary, convenient or beneficial for the successful [fol. 379] conducting of the business of this corporation; to acquire by purchase, appropriation, lease or otherwise, water rights, reservoirs, reservoir sites, irrigation ditches or canals, pipe lines or other hydraulic works to be used in the furtherance of the company's business; to buy, sell and exchange or otherwise acquire, the capital stock of other corporations or companies, that are or may be subsidiary or tributary to this corporation, and that contribute to the objects and purposes of the same.

To borrow money and to secure the same and the interest thereon by mortgage or deed of trust on any or all of the company's property; to make and negotiate its promissory notes, bonds or other agreements or obligations, and to secure the same in the manner herein provided; to deal in negotiable paper, or other securities or obligations, all of which shall be done in such manner and upon such terms as may be determined by the Board of Directors.

Article IV

The capital stock of this corporation shall be one million ($1,000,000.00) Dollars, divided into one million (1,000,000) shares of the par value of one dollar ($1.00) each. The amount of the capital stock subscribed for and taken by each of the incorporators and the residence of each incorporator is as follows:

Name	Residence	No. of Shares
W. C. Orem	Salt Lake City, Utah	75,000
C. N. Strevell	Salt Lake City, Utah	50,000
Jas. H. Paterson	Salt Lake City, Utah	50,000
A. L. Pearse	London, England	1,000
Richard P. Morris	Salt Lake City, Utah	20,000
A. J. Orem	Boston, Mass.	74,000
L. H. Curtis	Salt Lake City, Utah	120,000
Frederick A. Sweet	Salt Lake City, Utah	110,500
Foster J. Curtis	Salt Lake City, Utah	8,250

The balance of all said capital stock, to-wit: 491,250 shares, shall be held in the treasury of said corporation and be hereafter disposed of under the direction and authority of the Board of Directors of this corporation in such amounts for such price and for such purpose as the Board of Directors may hereafter determine upon, or may

be exchanged for property or stock in other companies or corporations that are or may be subsidiary or tributary to the objects and purposes of this company.

[fol. 380] Article V

This Company does take, purchase and receive the following described property in full payment for the entire capital stock of the company, to-wit:

The South half (S. ½) of Section nine (Sec. 9)—the northwest quarter (N. W. ¼) of Section sixteen (16)—the northeast quarter (N. E. ¼) of Section seventeen (17)—Lot four (4), Section nineteen (19), and Lot one (1) Section thirty (30), township thirteen (13) South, Range ten (10) East, S. L. M.; The southeast quarter (S. E. ¼) of the osutheast quarter (S. E. ¼) Section Twenty-four (24) and the northeast quarter (N. E. ¼) of the northeast quarter (N. E. ¼) Section twenty-five (25), Township thirteen (13) South, Range Nine (9) East, S. L. M. and 133,750 share sof the capital stock of the Western Coal and Coke Company, a Utah corporation.

It is agreed that the property above described is worth at a fair cash value the sum of one million ($1,000,000.00) Dollars.

Article VI

The officers of this corporation shall be a Board consisting of nine (9) Directors, also a President, Vice-President, Secretary and Treasurer, and such other officers as may from time to time be appointed by the Board of Directors. The President, Vice-President and Treasurer shall be directors of said corporation and all of such officers, excepting the Secretary must be the owner, as shown by the books of the corporation, at the date of his election, of at least one thousand (1,000) shares of the capital stock of this corporation, and continue to be the owner of said 1,000 shares of stock during the incumbancy of the office. The failure at any time of any officer to hold the amount of stock necessary to be qualified for election shall ipso facto vacate the office. Any three Directors shall constitute a quorum, and a vote of a majority of the quorum so formed shall be necessary to take corporate action.

Article VII

The following named persons and parties hereto shall be the officers of this corporation until the next annual meeting of the stockholders, to be held on the first Monday of October, 1907, as herein provided and until their successors shall be duly elected and qualified:

W. C. Orem—President and Director.

Frederick A. Sweet—Vice-President and Director.

[fol. 381] L. H. Curtis—Secretary, Treasurer and Director.

A. J. Orem—Director.

C. N. Strevell—Director.

A. L. Pearse—Director.

James H. Paterson—Director.

Richard P. Morris—Director.

Foster J. Curtis—Director.

Any vacancy caused by the resignation or death of any of said directors or officers may be filled by the Board of Directors until the next succeeding annual election.

Article VIII

That any or either of the officers or directors of the said corporation may be removed at a special stockholders' meeting, duly called and held to consider the question of such removal. The holders of a majority of the capital stock of said corporation either personally or by proxy, voting for such removal, and vacancies caused by any such removal may be filled at such meeting in the manner provided for in the election of officers, at any regular annual meeting.

Article IX

The term of the officers of this corporation except as otherwise provided for shall be one year and until their successors shall be duly elected and qualified unless such office is sooner vacated.

Article X

The annual stockholders' meeting of said corporation for the election of officers and for the transaction of any other business that may lawfully come before it shall be

held at 10 o'clock A. M., on the first Monday of October in each year at Evanston, in the County of Uintah, State of Wyoming, at the general office of said company. A representation of the majority of the capital stock of said corporation shall be necessary to legally hold said meeting or any stockholders' meeting of said corporation either general or special.

The directors of said corporation shall be elected by ballot and the nine persons receiving a majority of the votes of the stockholders present at such meeting shall be held and declared to be elected to the offices of directors. The offices of President, Vice-President, Secretary and Treasurer shall then be filled, all of whom shall be selected from the Directors elected, except the office of Secretary, who need not be a director or stockholder. All stockhold- [fol. 382] ers shall be entitled to as many votes as he holds shares of the capital stock and representation by proxy to be appointed shall be allowed at all meetings of said corporation either general or special. A failure to hold said last named meeting or a general meeting of said stockholders of said corporation on the day appointed for the same shall not forfeit or in any way interfere with the corporate rights acquired under this agreement, but any such meeting may be held at any subsequent time upon giving ten (10) days' notice by publication thereof in a newspaper of general circulation, published at Evanston, County of Uintah, State of Wyoming, and a like notice published in some newspaper of general circulation at Salt Lake City, Utah. The Secretary shall, or in case of his failure, any other officer of said corporation may give ten (10) days' previous notice of all annual or special stockholders' meeting by publication thereof in manner as aforesaid, but specifying the purpose or purposes for which any special meeting is to be held.

Article XI

The Board of Directors of this corporation shall have the power and authority to levy and collect assessments upon the outstanding capital stock thereof, for the purpose of conducting its business, paying expenses, or paying its debts. No assessment shall exceed 5% (five per cent) of the par value of the outstanding capital stock of

the corporation. No assessment shall be levied while a portion of a previous one remains unpaid, unless, 1st—the power of the corporation has been fully exercised in accordance with these Articles for the purpose of collecting said previous assessment. 2nd—Unless the collection of such previous assessment has been enjoined or restrained by law.

Every order levying an assessment must specify the amount thereof, when, to whom and where payable, fix a day subsequent to the full term of the publication of the assessment notice on which the unpaid assessment shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment, and a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

Upon making the order, the Secretary shall cause to be published a notice thereof, in the following form:

'Independent Coal & Coke Company. Location of principal place of business: Evanston, Uintah County, Wyoming, and Salt Lake City, Salt Lake County, Utah.

[fol. 383] Notice is hereby given, that — a meeting of the directors, held on the (date), an assessment of (amount) per share was levied on the capital stock of the corporation, payable (when, to whom and where). Any stock upon which this assessment may remain unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and unless payment is made before, will be sold on the (day appointed) to pay the delinquent assessment together with the cost of advertising and expense of sale. (Signature of Secretary, with location of office.)'

The notice must be served personally on each stockholder, or, in lieu of personal service, must be sent through the mail, addressed to each stockholder at his place of residence, if known, and if not known, at the place where the principal office of the corporation is situated, and be published once a week for four successive weeks, in some newspaper of general circulation, in the place designated in these Articles of Incorporation as the principal place of business, in Wyoming and Utah.

If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring

the stock delinquent, the secretary shall, unless otherwise ordered by the Board of Directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form:

'Independent Coal & Coke Company

Location of Principal Place of Business: Evanston, Uintah County, Wyoming, and Salt Lake City, Salt Lake County, Utah

There are delinquent upon the following subscribed stock, on account of assessment levied on the — day of ——, 19—, the several amounts set opposite the names of the respective shareholders as follows: (Names, number of certificate, number of shares and amount), and in accordance with law, (and an order of the Board of Directors made on the — day of ——, 19—, if any such order shall have been made) so many shares of each parcel of such stock as may be necessary will be sold at the (particular place) on the — day of ——, 19—, at the hour of —, to pay delinquent assessments thereon, together with the cost of advertising and expenses of the sale. (Name of Secretary, with location of office.)'

[fol. 384] The notice must specify every certificate of stock, the number of shares it represents, and the amount due thereon, except where certificates may not have been issued to parties entitled thereto, in which case the number of shares, and amount due thereon, together with the fact that the certificates of such shares have not been issued, must be stated.

The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale; when published in a weekly or semi-weekly paper, it must be published in each issue thereof for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale.

By the publication of the notice the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion

of the assessment or expenses of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and expenses of advertising and sale.

On the day, at the place, and at the time appointed in the notice of sale, the secretary shall, unless otherwise ordered by the Board of Directors, sell or cause to be sold at public auction to the highest bidder for cash so many shares of each parcel of the described stock as may be necessary to pay the assessment and charges thereon according to the terms of sale; if payment is made before the time fixed for sale, the party paying shall only be required to pay the expenses of advertising in addition to the assessment.

The person offering at such sale to pay the assessment and expenses for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock books of the corporation, on payment of the assessment and expenses.

If at the sale of stock no bidder offers the amount of the assessment and expenses due, the same may be bid in and purchased by the corporation through the Secretary, President or any Director thereof, at the amount of the assessment and expenses due; and the amount of the assessment and expenses shall be credited as paid in full on the books of the corporation, and entry of the transfer of the stock to the corporation shall be made on the books thereof.

While the stock remains the property of the corporation, [fol. 385] it is not assessable nor shall any dividends be declared thereon, but all assessments and dividends shall be apportioned upon the stock held by the stockholders of the corporation.

All purchasers of its own stock by the corporation vest the legal title to the same in the corporation; and the stock so purchased is held as treasury stock subject to the control of the directors, who may make such disposition of the same as they deem fit.

The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be extended from time to time by order of the directors entered on the records of the corporation for any period or periods aggregating not more than six months, but no order extending the time for the performance of any act specified in any notice shall be effectual unless

notice of such extension or postponement is appended to and published with the notice to which the order relates.

No assessment is invalidated by a failure to make publication of the notices herein provided for, nor by the nonperformance of any act required, in order to enforce payment of the same; but in case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew.

Affidavits made by the Secretary of the mailing of notices shall be prima facie evidence thereof. The publication of notices relating to assessments may be proved by the affidavit of the printer, foreman, or principal clerk of the newspaper in which the same was published; and the affidavit of the secretary or auctioneer shall be prima facie evidence of the time and place of sale, of the quantity and particular description of the stock sold, and to whom and for what price, and of the fact of the purchase money being paid. The affidavit shall be filed in the office of the corporation, and copies of the same certified by the Secretary thereof shall be prima facie evidence of the fact therein stated. Certificates signed by the Secretary and under the seal of the corporation shall be prima facie evidence of the contents thereof.

No stockholder shall be personally liable to this corporation for the amount of any assessment levied as herein authorized. The sale of his stock therein by this corporation for delinquent assessments shall be the exclusive remedy for the collection of said assessment.

[fol. 386] Article XII

The Board of Directors are hereby authorized and empowered to enact a code of By-Laws for the regulation and control of its affairs and business.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, this the 13th day of October, A. D. 1906.

W. C. Orem, C. N. Strevell, L. H. Curtis, A. J. Orem, Richard P. Morris, A. L. Pearse, Jas. H. Paterson, Frederick A. Sweet, Foster J. Curtis.

STATE OF UTAH,
County of Salt Lake, ss:

On Oct. 13th, 1906, personally appeared before me, W. C. Orem, Frederick A. Sweet, L. H. Curtis, A. J. Orem, C. N. Strevell, A. L. Pearse, Jas. H. Paterson, Richard P. Morris and Foster J. Curtis, all of whom are known to me to be the persons whose names are subscribed to the foregoing Articles of Incorporation; that each one of said parties personally acknowledged to me that he executed the foregoing Articles of Incorporation of The Independent Coal & Coke Company, for the purposes set forth in said Articles.

F. M. Orem, Notary Public. (Notarial Seal.) My commission expires Dec. 27, 1908.

Certificate of Proceedings Increasing the Amount of the Capital Stock of the Independent Coal & Coke Company.

THE STATE OF WYOMING,
County of Uinta,
Town of Evanston, ss:

We, the undersigned do hereby certify, That at a special meeting of the stockholders of the Independent Coal & Coke Company held at the office of said company in the Town of Evanston, Wyoming, on the 4th day of January, 1913, at 12:30 o'clock P. M., in pursuance with the regular call, and due notice of such meeting having been published, John R. Arnold was the duly appointed and acting Chairman, and F. A. Hewitt was the duly appointed and acting Secretary of said meeting, each of said appointees being stockholders of the said company;

[fol. 387] That the total stock and entitled to vote at said meeting was 898,319 shares of the capital stock of the said corporation, and it was duly found that the total number of shares of stock issued and outstanding at the date of said meeting to be 1,000,000 shares; that the whole amount of debts and liabilities of the company was $160,000, and further,

That John R. Arnold presented the following Resolution and moved that the same be adopted, to-wit:

Be It Resolved, That the Capital Stock of the Independent Coal & Coke Company be and it is hereby increased from $1,000,000.00 divided into 1,000,000 shares of the par

value of $1.00 each, to $1,150,000.00 divided into 1,150,000 shares of the par value of $1.00 each;

And Be It Further Resolved that article IV of the Articles of Incorporation of the Independent Coal & Coke Company, be and the same is hereby amended and re-enacted so as to read as follows:

'Article IV'

The capital stock of this corporation shall be One Mill-on One hundred fifty thousand dollars ($1,150,000.00) divided into one million one hundred fifty thousand (1,150,000) shares of the par value of one dollar ($1.00) each.'

Whereupon, A vote was taken upon said Resolution and motion, and upon canvass it was found: that there were 898,319 votes cast as Aye and in favor of said Resolution. Thereupon the Chairman declared that the said Resolution was unanimously carried and adopted.

In Testimony Whereof, the said Chairman and Secretary of the said stockholders meeting have hereunto set their hands and seals this 4th day of January, A. D. 1913.

Made in triplicate.

John R. Arnold, Chairman of said Meeting. (Seal.)
F. A. Hewitt, Secretary of said Meeting. (Seal.)

THE STATE OF WYOMING,
County of Uinta, ss:

John R. Arnold, being first duly sworn upon his oath, doth solemnly swear that he was the chairman of the stockholders meeting named in the foregoing certificate; that F. A. Hewitt was secretary of said meeting, and that the fore-[fol. 388] going certificate and the statements therein contained are true to the best of this affiant's knowledge and belief.

John R. Arnold.

Subscribed in my presence and sworn to before me this 4th day of January, 1913. Geo. P. Harvey, County Clerk, by Alex. Nisbet, Deputy. (Official Seal.)

THE STATE OF WYOMING,
County of Uinta, ss:

F. A. Hewitt, being first duly sworn upon her oath, doth solemnly swear that she was the Secretary of the stockhold-

ers meeting named in the foregoing certificate; that John R. Arnold was Chairman of said meeting, and that the foregoing certificate and the statements therein contained are true to the best of this affiant's knowledge and belief.

F. A. Hewitt.

Subscribed in my presence and sworn to before me this 4th day of January, 1913. Geo. P. Harvey, County Clerk, by Alex Nisbet, Deputy. (Official Seal.)

THE STATE OF WYOMING,
County of Uinta, ss:

I, George P. Harvey, County Clerk in and for the County and State aforesaid, do hereby certify that John R. Arnold, Chairman, and F. A. Hewitt, Secretary of the stockholders meeting of the Independent Coal & Coke Company, more particularly described in the foregoing certificate, who are personally known to me as the same persons whose names are subscribed to the said certificate as such Chairman and Secretary, appeared before me this day in person, and acknowledged that they executed, signed and sealed the said instrument of writing as their free and voluntary act, and as the free and voluntary act of the said Independent Coal & Coke Company, for the uses and purposes therein set forth.

Given under my hand and official seal this 4th day of January, 1913.

Geo. P. Harvey, County Clerk, by Alex Nisbet, Deputy. (Official Seal.)

[fol. 389] Certificate of Increase in Capital Stock, Increase in the Number of Directors, and Change of Date of Annual Stockholders' Meeting

We, the undersigned, hereby certify that at a Special meet- of the Stockholders of Independent Coal & Coke Company, at the request of a majority of the stockholders of the corporation held at the office of its Resident Agent, 142 5th Street, Evanston, Wyo., on Thursday, September 23, 192 at the hour of 2 o'clock P. M. and pursuant to a Notice giv in the following manner, to-wit:

By mailing to each of the stockholders of said corporation on the 7th day of September, A. D. 1920, a written no-

tice, properly addressed, stating the object of such meeting, and the time and place, when and where it would be held; and also by general notice of the time, place and object of said meeting published four successive weeks in the Wyoming Press, a newspaper published in Evanston, in the County of Uinta, Wyoming, the first publication of notice being on the 28th day of August, 1920, and the last publication on the 18th day of September, A. D. 1920.

The following resolutions were adopted, at least two-thirds of all the votes represented by the whole stock of said corporation issued and outstanding voting therefor:

Resolved that the Capital stock of this corporation is hereby increased from 1,150,000 shares of the par value of $1.00 each, to 2,500,000 shares of the par value of $1.00 each.

Resolved that Article X of the Articles of Incorporation be, and the same is hereby amended to read as follows:

'The Annual Stockholders' Meeting of said corporation for the election of officers and for the transaction of any other business that may lawfully come before it shall be held at 3 o'clock P. M. on the second Tuesday of March in each year at Evanston, in the County of Uinta, State of Wyoming, at the Office of the Resident Agent of said corporation. A representation of the majority of the capital stock of said corporation shall be necessary to legally hold said meeting or any stockholders' meetings of said corporation, either general or special.

The directors of said corporation shall be elected by ballot and the eleven persons receiving a majority of the votes [fol. 390] of the stockholders present as such meeting shall be held and declared to be elected to the offices of directors. The offices of President, Vice-President, Secretary and Treasurer shall then be filled, all of whom shall be selected from the directors elected, except the office of Secretary, who need not be a director or stockholder. All stockholders shall be entitled to as many votes as he holds shares of the capital stock and representation by proxy to be appointed shall be allowed at all meetings of said corporation either general or special. A failure to hold said last named meeting or any general meeting of said stockholders of said corporation on the day appointed for the same shall not forfeit or in any way interfere with the corporate rights ac-

quired under this agreement, but any such meeting may be held at any subsequent time upon giving ten (10) days' notice by publication thereof in a newspaper of general circulation, published at Evanston, County of Uinta, State of Wyoming, and a like notice published in some newspaper of general circulation at Salt Lake City, Utah. The secretary shall, or in case of his failure, any other officer of said corporation may give ten (10) days' previous notice of all annual or special stockholders' meetings by publication thereof in manner as aforesaid, but specifying the purpose or purposes for which any special meeting is to be held.'

We further certify that the amount of the capital stock actually paid in is $1,150,000.00. The whole of the debts and liabilities of the company is $36,711.69.

Witness our hands and the seal of said corporation this 23rd day of September, 1920.

John H. Tonkin, Chairman of the Stockholders' Meeting. W. B. Reed, Secretary of the Stockholders' Meeting.

STATE OF UTAH,
County of Salt Lake, ss:

John H. Tonkin and W. B. Reed, being first duly sworn on oath, depose and say that they are severally the Chairman and Secretary of the stockholders' meeting referred to in the above and foregoing Certificate, and that they have [fol. 391] read the foregoing certificate and know the contents thereof; and that the facts therein stated and set forth are true.

John H. Tonkin, W. B. Reed.

Subscribed and sworn to before me by John H. Tonkin and W. B. Reed, this 24th day of September, 1920. S. W. Nixon, Notary Public. My commission expires March 21, 1921. (Notarial Seal.)

Whereupon, it was stipulated that copies of the articles had been filed as required by law with the Secretary of State and the proper county clerk in the State of Utah, and the Independent Coal and Coke Company is authorized to do business in the State of Utah.

DEFENDANT'S EXHIBIT E

offered and received in evidence, is in words and figures as follows:

Ex. E, Deft.

Certified Copy of Minutes

A letter from Mr. A. C. Milner, transmitting a copy of a resolution adopted by the Independent Coal & Coke Company, relative to certain coal lands sold by the Board to the Carbon County Land Company, upon which the Board holds a mortgage, was read and considered. Said resolution recites that the Independent Coal & Coke Company has purchased the lands therein described and agrees to make payment to the State of Utah for the same in the sum of $112,000.00. After consideration, on motion of Commissioner Ipson, seconded by Commissioner Stewart, the letter and resolution were ordered filed and the Secretary directed to advise that when the $112,000.00 is paid, a release of the lands in question from the State's mortgage will be executed.

STATE OF UTAH,
County of Salt Lake, ss:

I, John T. Oldroyd, State Land Commissioner of the State of Utah, hereby certify that the foregoing is a full, true and correct copy of an extract from the minutes of the State Board of Land Commissioners, of a sitting had December 14th, 1920, as compared with minute book of the State Board of Land Commissioners of Utah, No. 15, page 789.

[fol. 392] In Witness Whereof I have hereunto set my hand and official seal of the said State Land Commisisoner on this — day of January, 1924, at Salt Lake City, Utah.

(Signed) J. T. OldRoyd, State Land Commissioner.

Attest: Fanny Draper. (Seal.)

M. E. WILSON, appearing and sworn on behalf of the defendant, Independent Coal and Coke Company, testified as follows:

I am a practising attorney in Salt Lake City and have been since the year 1901. In February, 1919, I accepted a monthly retainer from the Independent Coal and Coke Company and have been attorney for that company in this jurisdiction ever since that time. That company is a Wyoming corporation doing business in this state, under and pursuant to the laws of this state and operates certain coal mines in Carbon County, Utah. Its general manager since March, 1919, has been John H. Tonkin, who is now present in court. I want to say that the company is a growing concern and operated these coal mines in 1919 when I became its attorney, and had been operating this mine for a good many years last past, according to my general information. They are mines at Kenilworth, I presume you call them that, several mines there. Mr. Tonkin will go on and explain that.

No, sir, the mines that I had reference to were not all on this particular land in controversy. What I mean to say by that is this, that they were operating these mines upon other lands prior to 1919, and the Independent Coal and Coke Company didn't become interested in this land until 1920. It was simply an acquisition of more land rather than acquisition of land necessary to operate. Mr. W. G. McRoberts of Peoria, Illinois, an attorney representing certain interests, who owns stock in the Independent Coal and Coke company was the gentleman who first employed me, and for a time between the going out of the Edwards-Strevall administration and the coming in of the Tonkin administration, Mr. McRoberts acted as a sort of a manager as well as attorney, that is during that short interim; and Mr. Tonkin came on in March, 1919, and has since been manager. I state that in order to explain some of the correspondence that will be offered in evidence, some of the statements that I shall make.

[fol. 393] Along in the month of August, 1920, an abstract of title was exhibited to me covering about 1520 acres of land, I say about, I think I am exact about it, which the Independent Coal and Coke Company was contemplating purchasing from the Carbon County Land Company. That land included the 1120 acres of land which the Independent Coal and Coke Company claims in this case and certain other lands, making the whole 1520 acres of land. Upon that abstract of title I rendered an opinion.

Mr. Lacy: I object to the testimony of any opinion on this title rendered at that time, for the reason that this testimony does not tend to establish any defense on the part of the Independent Coal and Coke Company or to avoid the notice of the former judgment and decree in the proceedings in the former suit.

The Court: I am letting them make the record.

Mr. Wilson: The abstract of title submitted to me didn't disclose to my mind—whether it was a good mine or not, I will not debate that—that this particular land was the land that had been involved in the Milner suit. I will state to the court and counsel for the record that I was familiar with the Milner litigation and familiar with the decision, and for that reason in the first instance not believing that it had anything to do with the Milner suit, I rendered an opinion that the fee simple title to this land was in the Carbon County Land Company subject to a mortgage of $556,428.00, subject to certain tax sales which I saw. Later on, and when I say later on, I mean just a month or so, Mr. W. G. McRoberts of Peoria, Illinois, communicated with me on the 31st day of August, 1920, and sent me a typewritten copy of the transcript in the case of United States v. Truth A Milner, showing that this land being purchased, 1120 acres of the land being purchased, was a part of the same land involved in the decree entered in 1914 in the Milner case, and later confirmed by the Circuit Court of Appeals in 1915.

I read that decree. I read that opinion of the Circuit Court of Appeals, as it is reported in 228 Federal, and I have no disposition to dispute in any sense but I saw it, understood it fully, acquainted myself with at least what it said. I might not have understood it. I think I did. I have here Mr. McRoberts' letter transmitting that which I will be very glad to submit to counsel if he desires and read it to the court.

I have also the original opinion that I rendered on August 12, 1920, and then later on I have an opinion which I wrote on September 14, 1920, to this company and the cor-
[fol. 394] respondence relating to the employment and the payment of Judge Morse who rendered his opinion, and I ask that all of the correspondence be marked as one exhibit and offer that in evidence. This is all of the correspondence that I have. Some of it are copies but they are true

and correct, all of the correspondence I have in regard to the acquisition of this land.

I will state that the opinion speaks for itself but in substance states that I found that the Carbon County Land Company had title, and it also shows that on Sepember 25, 1920, I wrote this letter to Mr. McRoberts, quoting briefly from that, so as to call it to your attention:

"September 25th, 1920.

Mr. W. G. McRoberts, Attorney-at-law, Central National Bank Bldg., Peoria, Ill.

My Dear McRoberts: When I saw you at Evanston the other day, I spoke to you concerning a decision of the First Assistant Secretary of Interior relative to the Statute of Limitations and its applicability to land acquired by means of certification. I also mentioned to you the fact that I had a copy of the minutes of the State Board of Land Commissioners relative to the original Milner suit.

When I left you at the Hotel Utah, I expected to see both you and Mr. Reed before you departed. Then Mr. Reed called me by telephone today and told me of your intended departure. For that reason I send you the case of Cole vs. State of Washington, 37 Decisions of the Department of Interior, 387, and I also send you a complete copy of the minutes of the State Board of Land Commissioners to which I have referred. This decision and these minutes may be of interest to you in connection with the title to the coal lands about which we have already had discussion. I presume that you will be able to get a copy of this decision. If not, I will be glad to send you a complete copy, upon request.

Very truly yours, —— ——,

MEW/C."

Exhibit F identified and read in evidence on the part of said defendant is in words and figures as follows:

[fol. 395] DEFENDANT'S EXHIBIT F

September 28th, 1920.

Independent Coal & Coke Company, Walker Bank Bldg., City.

Attention Mr. Tonkin, Gen. Mgr.

GENTLEMEN: I herewith enclose copy of communication which I addressed to Mr. McRoberts the 25th of September, 1920, together with a reference to the case of Cole vs. State of Washington, 37 Decisions of the Department of the Interior, page 387.

You will notice that the certification is held to be equivalent to a patent and that the Statute of Limitations relative to the institution of suits to cancel patents applies to suits to cancel certifications. This decision of the Department of the Interior absolutely sustains the previous opinion which I have rendered to your company.

I send you these communications so that you may have them for your files.

Very truly yours, —— ——.

MEW/C.

September 25, 1920.

Mr. W. G. McRoberts, Central National Bank Bldg., Peoria, Ill.

MY DEAR MCROBERTS: When I saw you at Evanston the other day, I spoke to you concerning a decision of the First Assistant Secretary of Interior relative to the Statute of Limitations and its applicability to land acquired by means of certification. I also mentioned to you the fact that I had a copy of the minutes of the State Board of Land Commissioners relative to the original Milner suit.

When I left you at the Hotel Utah, I expected to see both you and Mr. Reed before you departed. Then Mr. Reed called me by telephone today and told me of your intended departure. For that reason I send you the case of Cole vs. State of Washington, 37 Decisions of the Department of Interior, 387, and I also send you a complete copy of the minutes of the State Board of Land Commissioners to

which I have referred. This decision and these minutes may be of interest to you in connection with the title to the coal lands about which we have already had discussion. I [fol. 396] presume that you will be able to get a copy of this decision. If not, I will be glad to send you a complete copy, upon request.

Very truly yours, —— ——.

MEW/C.

Sept. 16, 1920.

Independent Coal & Coke Company, Walker Bank Bldg., City.

GENTLEMEN: Herewith please find enclosed bill for services rendered by Hon. C. W. Morse in connection with the examination of title to the coal lands situated in Carbon County. Kindly let me have a check in his favor.

Very truly yours, —— ——.

MEW/C.
Encl.

All Agreements are contingent upon causes of delay beyond our control, including strikes, accidents, riots, acts of God, lockouts, fire, flood, inability to secure cars or transportation. Quotations subject to change without notice.

Independent Coal and Coke Company

Mines: Kenilworth, Carbon County, Utah. General Offices: Walker Bank Building

John H. Tonkin, Gen'l Manager, Salt Lake City, Utah

243. ¼

Sept. 17, 1920.

Mr. Mahlon E. Wilson, Attorney, 424 Kearns Building, Salt Lake City, Utah.

DEAR MR. WILSON: I am in receipt of yours of Sept. 15th, enclosing copy of your opinion, and also copy of the opinion of the Hon. C. W. Morse, relative to the lands that we propose to acquire from the Carbon County Land Company.

I appreciate having these copies.

Yours sincerely, John H. Tonkin.

JHT/NMG.

[fol. 397] Aberdeen is the Coal to Burn

United States Fuel Company, Kearns Building, Salt Lake City, Utah

Office of C. W. Morse, Attorney

Sept. 16, 1920. 243

Mr. M. E. Wilson, Attorney-at-law, Kearns Building, Salt Lake City, Utah

My Dear Mr. Wilson: Enclosed I am handing you bill for my services in the matter of the title to coal land in Carbon County, proposed to be purchased by the Independent Coal & Coke Company.

Yours truly, C. W. Morse.

Salt Lake City, Utah, Sept. 14, 1920.

Mr. M. E. Wilson, Attorney-at-law, City.

Dear Sir: As requested by you, I have examined and carefully considered the abstract of title handed me to certain coal lands transferred by the State of Utah to the Milner Corporation, together with the transcript of the record in the case of The United States Government vs. Truth A. Milner, et al., as well as the letter received by you from Mr. McRoberts relating to this title.

It appears from this record that the action was brought by the Government to cancel and acquire the delivery for cancellation to the State of Utah of the contracts which theretofore had been entered into between Truth A. Milner, et al., for the purchase from the State of certain mineral lands, including the lands in question. As a result of the trial of this case in the Circuit Court for the District of Utah, a decree was entered quieting the title of the United States to these lands and requiring the delivery for cancellation of the contracts of purchase. Coupled with this order [fol. 398] was an injunction enjoining the defendants and all persons claiming through or under them, from asserting or claiming any right, title or interest in and to these lands or any of them, and I note that Mr. McRoberts suggests that possibly this injunction, unless modified, would constitute an obstacle to the procuring of title by the Milner Corporation from the State of Utah under the compromise arrange-

ment made in the early part of this year. The effect to be given to the language employed in an injuction decree must always be determined with reference to the matter under consideration in the proceeding in which the injunction is issued. The matter under consideration by the Circuit Court was the claim of title by Milner and others under and by virtue of the contracts of purchase entered into with the State of Utah, and in my opinion the extent of the prohibition was to restrain and enjoin them from at any time, either directly or indirectly, through themselves or other parties, claiming by virtue of those contracts any right, title or interest in the land, and would not constitute a disqualification which would render them unable to procure and hold title to these lands, or some of them, by any valid means through which they might be able to procure the same, after the entry of said decree. I am therefore of the opinion that if the title of the State of Utah in 1920 was valid, its patent to these lands would transfer a good title to the Milner Corporation.

My analysis of the facts as disclosed by the transcript and the decree, and the opinion of the Circuit Court of Appeals in the Milner Case, is, that if the same facts had been presented in a proceeding brought by the United States Government in a court having jurisdiction against the State of Utah for the purpose of cancelling the certification of these lands and annulling the title acquired by the State under such certification, the title to the State would have been cancelled and annulled; in other words, my view is that the title acquired by the State under the certification by the Secretary of the Interior was merely a validable title, which if attacked seasonably in the proper court by proper proceedings, would be declared void.

I am not, however, prepared to say that it is my opinion that the title acquired by the Milner Company under the patent issued by the State of Utah during the early part of this year, is not a marketable title. In the first place, the Department of Justice of the United States in 1907 elected, or rather determined to proceed against the persons who [fol. 399] had contracted for the purchase of this land from the State of Utah, and procure the cancellation of their contracts upon the ground that they had secured the selection and certification of these lands through fraud, rather than to proceed against the State of Utah for the purpose

of procuring a cancellation of the certification and for the purpose of divesting the State of the title acquired by it under such certification. As indicated by the opinion of the Circuit Court of Appeals, it was conceded by all parties that the State through its officers had been guilty of no fraud and had not attempted to procure the certification of these lands improperly. The only persons whom it was alleged committed any fraud were Milner and his associates, and the action of the officers of the United States from the time of commencement of the proceedings against Milner to the present date have all been in accord with the view that the State of Utah ought not to be disturbed in the title acquired under the certification from the Secretary of the Interior of these lands.

—2—

I think it may be conceded that the fact of a certification in response to a selection regularly made by the State Land Board under the Statutes of the State and the Act of Congress known as the 'Enabling Act,' by the terms of which lands were granted to the State of Utah and under which the selection and certification of these lands were made would pass without other act on the part of the Government the legal title to the State. No further act is required and no patent is issued by the Government, so that on the face of this record the legal title appears to be in the State of Utah without any disposition manifested on the part of the officials of the United States Government to disturb or question this title, and while the title at the time transferred by the certification was voidable, I think we may reasonably expect that no efforts will be made to set aside this title. Under the Act of March 3rd, 1891, suits by the United States to vacate and annul any patent theretofore issued could only be brought within five years from the passage of the Act, and suits to vacate and annul patents thereafter issued, could only be brought within six years after the date of the issuance of such patents. If I am correct in the assumption that the selection by the State Land Board and the certification under such selection by the Secretary of the Interior passes the title and is the equivalent of the issuance of a patent, then I think we may safely say that

the Statute of Limitations above referred to would inure to [fol. 400] the benefit of the State of Utah or any one holding title under it to these lands.

The question as to whether the officers of the Department of Justice may at any time hereafter undertake to disturb this title, and the question as to whether it would be held that the title of the State, acquired as it has been, would come within the provisions of the Statute of Limitations above referred to, cannot in advance be determined, and should your clients determine to purchase this land, they must take the chances of an adverse answer to these questions, which in my judgment are quite remote.

Yours very truly, (Signed) C. W. Morse

—3—

September 15th, 1920.

Mr. W. G. McRoberts, Attorney-at-Law, Central National Bank Bldg., Peoria, Ill.

DEAR SIR: I have given considerable thought and attention to your favor of August 21st, 1920, relative to the title to the coal lands situated in Carbon County, Utah, which it is proposed that the Independent Coal & Coke Company shall acquire from the Carbon County Land Company.

It is suggested in your letter, and I agree with you, that this is a matter of considerable importance, and in view of its importance, after consultation with Mr. Tonkin, the General Manager, I entered into a consultation with the Honorable C. W. Morse relative to my conclusions and the state of this title.

I will first consider the unimportant matters, and these are the amendment of the caption and the setting forth of the mortgage. These matters, of course, can be readily taken care of.

Passing to a consideration of the important question, I am still of the opinion that the legal title to these lands is vested in the Carbon County Land Company by virtue of the patent issued by the State of Utah February 10, 1920. On the face of the papers and on the face of the record this title in my opinion is good and marketable, subject of course, to the encumbrances to which I have heretofore referred, viz., tax titles and mortgages.

[fol. 401] In giving this opinion, I have taken into consideration the proceedings had in the United States Circuit Court for the District of Utah and in the United States Circuit Court of Appeals for the Eighth Circuit. It appears that in these proceedings the United States Government commenced an action against Truth A. Milner, executrix of the estate of Stanley B. Milner, deceased, and also against other parties, to *said e to* set aside and cancel certain contracts which the Milners had entered into with the State of Utah for the purchase of certain coal lands situated in Carbon County, Utah. And some of the same lands that are involved in the proposed transfer were included in that suit. To that suit the State of Utah was not a party and as far as I can learn, it was the apparent purpose of the government not to interfere with the legal title which was vested in the State of Utah by virtue of the certifications theretofore made and approved by the Secretary of Interior.

I cite the case of Milner vs. United States, 228 Fed. 431. It appears that the applications were made and approved in the years 1901, 1902, 1903 and 1904, and that Milner undertook to and did enter into a contract with the State of Utah to purchase these lands at the price of $1.50 per acre. The United States, without making the State of Utah a party, proceeded to and did set aside this contract existing between the Milners on one end and the State of Utah on the other. In my opinion, however, this did not in any wise affect the legal title to the lands which, by reason of the certification, was in the state of Utah. It has been definitely and unequivocally held that the certification of the lands operated to transfer the legal title to the State of Utah.

Williams vs. United States, 138 U. S. 514, 34 L. E. D. p. 1026.

On page 1028, Mr. Justice Brewer, in rendering the opinion of the United States Supreme Court, said:

'It cannot be doubted that the certification operated to transfer the legal title to the State (Frasher v. O'Conner, 115 U. S. 1021-29 L. Ed. 311)';

In the case cited, the United States was undertaking to cancel a contract between Williams and the State of Nevada. The State of Nevada was not made a party and the

State of Nevada, as I am informed, did what Justice Brewer considered 'the dignified act' and afterwards surrendered or relinquished the legal title to the United [fol. 402] States. I cite the authority to establish the proposition that the certification transferred the legal title to the State of Utah; that this certification was in all respects the equivalent of a patent issued by the United States of America.

In the case under consideration, the State of Utah has not relinquished the legal title to the United States of America, and I understand that it will not do so, and I understand further that there is or has been no disposition on the part of the United States to compel the State of Utah to make this relinquishment.

It is undoubtedly true that the United States might have, in some appropriate proceeding in the United States Supreme Court, perhaps, compelled the State of Utah to relinquish this title on the ground of fraud and on the ground that the lands were mineral lands, and could be acquired only as is provided in the United States Statutes for the acquisition of title to coal lands. But the United States has not seen fit to take any such steps and in my opinion the United States is now barred by the Statute of Limitations.

Of course, this title has within it certain elements which make it appear to be voidable, but it is not void, and if the Statute of Limitations applies and has run, it is not even voidable. Any purchaser purchasing this land from the State of Utah would be entitled to its possession and its enjoyment as against all persons, until such time as the title was annulled in appropriate proceedings. The Carbon County Land Company was not in any wise disqualified by reason of the injunction from purchasing the land from the State of Utah, the holder of the legal title. I realize that anyone purchasing it takes some chance. In my opinion it is a remote one. I look at it as a practical question. I think that if the investment is a good one from a business standpoint, it is one that the Independent Coal & Coke Company ought not to refuse because of the difficulties that may arise over the title. It seems that the Independent Coal & Coke Company is to get the benefit of the five year provision in the mortgage existing between the Carbon County Land Company and the State of Utah, and that it is pay no interest for a period of five years. This certainly

affords a substantial protection to the Independent Coal & Coke Company for the amount of the mortgage debt, at least.

Of course, if the Independent Coal & Coke Company desires a title which is absolutely double riveted and perfect, both on its face and in fact, something that can be [fol. 403] established to a point of demonstration, then this title is not such a title, and it is not often that such a title can be found. As practical lawyers, we know that anyone purchasing real estate takes more or less chance. These chances must be weighed and weighing the chanches in the case under consideration, I do not believe they are of sufficient importance or moment to justify the refusal of this proposition, if the proposition is one that has merit in it from a business standpoint.

So far as the suggestion which is made relative to a reformation or amendment of the decree of the United States Circuit Court which has been affirmed by the decree of the United States Circuit Court of Appeals, I have this

—3—

to say: In the first place there is no power or jurisdiction in the United States Court to amend this decree. The terms at which the decrees were rendered and affirmed have long since expired and passed. The judgment is final. It deals with the situation as it then existed and it could not be amended now.

Furthermore, I would deem an attempt to amend it very ill advised because I believe that it might stir up matters which might well be allowed to rest.

Then, again, I am informed by the attorney for the Milners that they would not consent to entering into any effort to amend or reform that decree. They prefer to leave matters as they stand now, and in taking this position I believe they are showing good judgment.

I submit a copy of the opinion handed me by Hon. C. W. Morse, I believe these two letters will give to you our views upon this question.

Very truly yours, —— ——.

MEW/C.

—4—

Sept. 15, 1920.

Mr. John H. Tonkin, Genl. Mgr. Independent Coal & Coke Co., city.

DEAR SIR: I hand you herewith copy of opinion prepared by myself and addressed to Mr. W. G. McRoberts, and also copy of the opinion of the Hon. C. W. Morse of this city. These opinions relate to the lands proposed to be acquired [fol. 404] by the Independent Coal & Coke Company. I have sent the originals to Mr. McRoberts.

Very truly yours, —— ——.

MEW/C.

Sept. 6th, 1920. 243.

Mr. W. G. McRoberts, Attorney at law, Central National Bank Bldg., Peoria, Ill.

DEAR SIR: I am in receipt of your letter of August 31st, relative to the coal lands in Carbon County, Utah, together with a copy of the transcript of record in the chancery case wherein the United States of America was plaintiff and Milner et al. were defendants.

I note your suggestion in regard to this title and I will go over the matter and give you my written opinion within a short time, in accordance with your directions.

Yours very truly, —— ——.

MEW/C.

W. G. McRoberts. H. D. Morgan

Law Offices of McRoberts & Morgan, Central National Bank Bldg., Peoria, Illinois

August 21, 1920.

Hon. Mahlon E. Wilson, 423 Kearns Building, Salt Lake City, Utah.

DEAR SIR: I have before me letter of Mr. John H. Tonkin, General Manager of the Independent Coal & Coke Company, bearing date August 20, 1920, enclosing abstract of title to 1520 acres of coal lands in Carbon County, Utah, which it is proposed to acquire from Carbon County Land

Company, and enclosing your letter of August 12, 1920, addressed to Independent Coal & Coke Company giving your opinion upon an examination of the abstract.

As this is a very important transaction and runs into a whole lot of money, I have delayed examination of it until the return of W. B. Reed. Mr. Reed and myself have today [fol. 405] gone over the abstract and have considered it in connection with the authenticated transcript of the record in the equity suit of United States of America vs. Truth A. Milner, Carbon County Land Company, et al., filed in the Circuit Court of the United States for the District of Utah, September 26, 1907.

We find that the caption of the abstract of title should be amended by striking out 'the Northeast Quarter of Section 11' and inserting in lieu thereof 'the Northwest quarter of Section 11.'

While at No. 3 of the abstract the State of Utah issues its patent to Carbon County Land Company conveying land which includes the West half of Section 2, there is nothing in the abstract to show how the State of Utah acquired title to the West half of Section 2, and it is our opinion that this deficiency should be supplied.

We are sending you by registered mail today the transcript of the record in the chancery case above referred to, United States of America vs. Truth A. Milner, Carbon County Land Company, et al, and you will note at the top of page 3 that 1120 acres of the land now under examination is involved as the subject matter of the suit. At page 137 you will note the decree finds that the title is quieted in the United States of America, and that the defendants and all persons claiming through or under them have no right, title or interest, and defendants are perpetually restrained, and at page 150 you will note that the United States Circuit Court of Appeals affirms the decree of the United States Circuit Court, and at page 149 the language is so strong that defendants have no right, title or interest, and any person claiming through or under the defendants have no right, title or interest.

In view of this decree, of which we have notice, it is our opinion that the Carbon County Land Company should procure a modification of this decree before the Independent Coal & Coke Company purchases from Carbon County Land Company. In other words, if the Carbon County Land

Company rests its title to convey to Independent Coal & Coke Company upon the patent from the State of Utah dated February 10, 1920, it should set up that fact in the United States District Court as the basis of obtaining a modification of the decree of injunction heretofore entered.

While Mr. Tonkin has furnished us with a letter from the Secretary of State Board of Land Commissioners, and also extracts from their proceedings indicating that we [fol. 406] would have a right to obtain a release from the mortgage given to the State of Utah upon the payment of $64,000 for each 640 acres to be released, we believe that the mortgage should be set forth in full in the abstract in order that we may not be required to take anything for granted.

We are advising Mr. Tonkin that we have brought some new matters to your attention, and when you have fully considered them, will you kindly advise him of your conclusions, as well as give us your further written opinion.

All of which is respectfully submitted.

Very truly yours, Signed W. G. McRoberts.

P. S.—We enclose abstract of title herewith. McH.

August 12th, 1920. 271.

Independent Coal & Coke Company, Walker Bank Building, City.

GENTLEMEN: You have submitted to me abstract of title prepared by J. W. Hammond purporting to show title in the following described lands, to-wit:

All of Section 3, West half of Section 2, North half and East half of the Southeast quarter of Section 10, and the Northeast quarter of Section 11, all in Township 13 South, Range 10 East of the Salt Lake Meridian.

From an examination of this abstract I am of the opinion that the fee simple title to said lands is at this time vested in the Carbon County Land Company, a corporation, subject to certain tax sales enumerated as follows, to-wit:

1. Tax Sale dated January 10, 1914, recorded in Tax Sale Register #4, page 14, of the Carbon County Records.

2. Tax Sale dated December 18, 1917, recorded in Tax Sale Register #8, page 10, of the Carbon County Records.

3. Subject also to a mortgage in favor of the Milner Corporation, in the sum of $67,308.80.

4. Subject also to a mortgage in favor of the State of Utah, in the sum of $556,428.00.

[fol. 407] Taking into consideration these encumbrances and exempting them from the consideration of this opinion, the fee simple title to these lands are vested in the Carbon County Land Company, a corporation.

Very truly yours, —— ——.

MEW/C.

We paid approximately 360,000 shares of capital stock of the Independent Coal Company which to my knowledge had never sold and did not sell for less than 60c a share, and which had always paid, with the exception of one quarterly dividend, 6% per annum on a par value of $1.00 per share. We paid that stock to the Carbon County Land Company and that was taken by the Carbon County Land Company. We also agreed to pay the State the $112,000.00 mortgage that is upon the land. That stock was worth at lease $250,000.00 and that is very conservative, perhaps $300,000.00. We paid that in such a way, your Honor, that we could not recover it back at this time.

I will say that I passed upon this title and that the transaction was closed approximately December 14, 1920, and I have never heard any more about it until May, 1924, when the present suit was brought. This stock just went on the open market, and was sold by the various parties who got it, and I think the Carbon County Land Company, according to my last investigation only has 28,000 or something of that kind at the present time of that stock, that is my last investigation.

Examination by Mr. King:

At the time I was making my investigation on behalf of the Independent Coal and Coke Company with reference to the title to this property I had in consultation with me Judge C. W. Morse, formerly Judge of the Third Judicial District Court, and a judge of the State of Utah. I listened to what the firm of King, Braffet and Schulder, at time representing the Carbon County Land Company,

had to say, but I used my own independent judgment along with that of Judge Morse. The counsel then acting for this company gave and rendered an opinion with reference to the legal title of this property in the State of Utah. When I began this investigation and conferred with counsel then representing the Carbon County Land Company, it had already entered into independent negotiations for the purchase of this land and had a patent to the land and had executed a mortgage for $556,428.00. As I recall it that was done February 10, 1920. I didn't get [fol. 408] into this matter until August, 1920. I couldn't say about the Carbon County Land Company having possession. I would simply say that I presume that possession followed the giving of the patent. I was never upon the property in my life.

I wish to state further that I have no interest as a stockholder or otherwise in either the Carbon County Land Company or the Independent Coal and Coke Company. I am merely attorney for the Independent Coal and Coke Company.

Cross-examination.

By Mr. Lacy:

I knew even as early as 1914 about this division here. I have stated that here to you and in 1915 I found out about the Circuit Court of Appeals decision. I tried to keep informed of those things and I thought I did, and the only thing I didn't know in August, 1920, when it was first submitted to me was that this land that was being offered for sale was the same land that was involved in that litigation; but then as the correspondence will show on August 31, 1920, Mr. McRoberts called my attention to that fact that the land was the same land, and then Judge Morse—in fact I will tell you the circumstances of employing him, as I was very doubtful about this title, I will say that to you. Mr. King has correctly stated that they had assured me it was good, but I knew that they were sellers and I was a buyer, my client was, and I went into the matter and I then went to Mr. Tonkin and said to him that I had arrived at a certain definite conclusion but that I would like to take independent advice upon this question. He said to me, "Mr. Wilson, I am not very well acquainted with the members of

the bar, and you employ whomever you see fit." I said, "Well, I shall employ Judge Morse, who has been an equity judge here for ten years, and he is a very conservative man," and I therefore employed Judge Morse, and I will say to you that I didn't try to influence his opinion, but I simply laid before him that information which he took up there and if you will read his opinion you will be somewhat surprised at the fact that they were very close together.

Examination by Mr. Parker:

I will state to you what information I had upon the subject of the sale by the state being a part of the consideration for the mortgage and note which are in evidence—a separate sale independent of the deal which was originally [fol. 409] made—which was involved in the original suit between the United States and the Milners as reported in 228 Fed. I understood that the suit was reported. It was decided in this court in 1914 and affirmed by the Court of Appeals in 1915, and at that time set aside a certain transaction between the Milners, the Carbon County Land Company and the State of Utah whereby they were buying this land for $1.50 per acre, that the transaction was entirely annulled, as it will be seen from the opinion which I have filed. That is all discussed; Judge Morse discussed it. I understood that at one time in 1919 or 1920, being consummated before or about February 10, 1920, that the Carbon County Land Company had bought this land from the State of Utah at $100.00 per acre and had given a mortgage to the State of Utah and had taken patent and had given the mortgage to the State of Utah for $556,428.00, which was $100.00 an acre.

I understood that the two transactions were separate and distinct. That was my understanding, and I want to state further that I also understood this with reference to the Independent Coal and Coke Company that this 1120 acres of land that we got or that the Independent Coal and Coke Company got was so situated as to be in a sort of a strategic position with reference to their interests, other mines and other lands, and that they could not very well allow any private owner or any other operator to come in there and acquire that land. That is the 1120 acres or rather the 1500 and some odd acres, including this 1120 acres; and while as I stated in my opinion, this is not to

my mind a perfect title, that is, a double-riveted title or a title that could be established to a point of demonstration, I still think it was a good marketable title. I will say I don't know of any title that can be established to a point of demonstration. I have never seen one, but I think this was a good marketable title and I so rendered an opinion. I may be mistaken about that; that is another matter.

J. H. TONKIN, produced as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

I am sixty years of age and reside in Salt Lake City, Utah. I came here in March, 1919. Mr. Wilson was employed as general attorney for the company before I came here. My employment commenced March 25, 1919. Since that time I have been general manager and in charge of the [fol. 410] affairs of the Independent Coal and Coke Company. I understand it is a Wyoming corporation doing business in this state and has its mines at Kenilworth in Carbon County, Utah. I have never had any connection with the Independent Coal and Coke Company prior to becoming manager. Yes, sir, I am familiar with what might be called the Edwards-Strevall administration of that company, which preceded mine. The Sweets, F. A. Sweet and the Orems, named as incorporators, were in no wise interested in the company since I became manager. Mr. Strevall was a very small stockholder. If my memory serves me correctly, there are 302 stockholders, pretty well divided, scattered from Louisville, Kentucky, to England and France. A great many of them live in Peoria, and in Chicago, also in San Francisco. Mr. Strevall is the only one of the original incorporators who is interested in this company at all. The situation has had the usual changes of stock, but there has been no large sale, no large changes at all. I recall the purchase of certain lands in 1920 by the Independent Coal and Coke Company. The Carbon County Land Company was handled in general by Mr. A. C. Milner. I think Mr. Milner first approached me, I don't think he had

had it up with the company before 1920. I know where that 1120 acres of land involved in this action is located.

The mines were open, two mines, No. 1 and No. 2, No. 1 lying west of No. 2, and No. 1 mine had secured from the Government by a cash purchase, sufficient territory to last for a number of years. No. 1 was the oldest mine and immediately north of the property known as No. 2 and east of the No. 1 property was this considerable block of coal that in my opinion could be worked to advantage by the Independent Coal and Coke Company and would entail a serious hardship upon the Independent Coal and Coke Company if someone else was working that ground, owing to the location of the canyon and the possible application of rights for companies to come through the Independent land which would be an annoyance. That block of coal that I have just referred to was in this 1120 acres of land that is involved in this suit. I did not take up negotiations with Mr. Milner to buy that land. Mr. Milner approached me, and I took the matter up with the Independent Coal and Coke Company Board. Mr. McRoberts is an attorney at Peoria, a member of the firm of McRoberts & Morgan, and Mr. McRoberts was a director on the Independent Board as trustee for the Barker Estate, and he owned a very considerable stock interest. In the interim between the going out of the Strevall administration and my coming in, Mr. [fol. 411] McRoberts had been acting as sort of a manager. He and Mr. Reed had been in charge. When I referred this Milner proposition to the Independent Board, Mr. McRoberts was the president of the Board. It passed into the hands of Mr. McRoberts, and, as I understand it, was then turned over to you as attorney for the company. I recall you coming over and asking the privilege of employing Judge Morse in this matter, and I consented to it. The Independent Coal and Coke Company to my recollection paid 500,000 shares of the capital stock for this land, that is, for the 1520 acres. I have not figured it that way—that allocating the stock to the land itself, segregating away from the 1500 the 1120, that would mean about 365,000 shares. I figured that the land cost us better than—somewhere around $430.00 an acre. There was an assumption of a mortgage of $112,000.00 to the State of Utah with interest at 5% after 1925. The mortgage of course has not been paid on account of this law suit, and is still standing. The

company issued 500 shares of stock for the 1520 acres of land. I would say that there would not be any difference in the value of the land approximately, taking out the 400 and some acres. I can't agree with you on your statement of the value of this stock. I contend that stock is worth $1.00 at the time it was purchased and was on the Independent books for $500,000.00. I don't agree with you on the word "worth." The stock had been sold for 60c a share, but that does not——

Mr. Lacy: That evidence as to stock value is objectionable because it does not tend to prove any issue or any defense on the part of the Independent Coal and Coke Company.

The Court: It is all offered for the purpose of showing good faith.

Mr. Lacy: The same objection as to all this testimony.

The Court: I will admit it for that purpose.

Witness: It is true that all of the stock had a market value at the time of that transaction of at least 60c a share. Dividends paid upon that stock have averaged 6% since 1919 on its par value. This stock was turned over to the Carbon County Land Company and considerable of it has been sold, practically the biggest end of it. I know that from the transfers on the books. Dividends have been paid upon that stock the same as other stock, 6% per annum. I wouldn't care to make the statement that I have never missed but one quarterly dividend since I have been manager. I know there have been dividends passed, but they [fol. 412] have been made up. It is a fair statement that this stock has paid approximately 6% per annum ever since I have been manager. So far as I am concerned, and so far as any member of the Independent Coal and Coke Company is concerned, neither I nor any of these parties have any purpose whatever to cheat or defraud the Government. I felt absolutely sure we were acting honestly.

I have a working map of our property there, and I have a small map showing that adjoining property. The working map will probably show you better. This shows both mines, and it shows both the bottom seam, the Aberdeen seam in both mines.

Exhibit G is an outline map of the lower seam or bottom seam or the Aberdeen seam showing the outline of the property. That seam or a part of it is in the land involved

in this suit. These entries here, the former boundaries of No. 2, run across on this section line there. That is the land under discussion, the land acquired in 1520 acres there. This is the No. 1 mine here. The figure 3 and the figure 2 denote the section. The land is bounded from the place marked X, on down the line here to another X and to another X. Then here goes on straight across. That is the 1520 acres acquired in this transaction in 1920 and include the 1120 acres involved in this suit. There were certain other workings being shown in section 9 which joins on to section 3. Those are workings tributary to the No. 1 mine. That is in section 9, and I might say this coal here was acquired in the early part of 1920 from the Government. The original workings are west of what is marked on the map as No. 1 mine. Northeast we have the land which was acquired from the Government in 1920, and going on east we get into the land, a part of which is in dispute in this case. We are not in the land involved in this suit at all from No. 1 tunnel. Before I acquired that land I was not working toward its boundary. I was working up from the line in here. We secured a right of way from the United States Government and ran into our own territory here. By here I mean immediately south of the land in controversy. As soon as this land was acquired, as soon as title to this land was established, as we thought, we drove this No. 2 tunnel. The first tunnel we drove we called it the No. 1 tunnel to reach this coal at a point here. It is the southwest corner of the land that I acquired. No, it struck the Aberdeen here in section 10. Some of it was continued on on the lower seam and struck the Kenilworth seam, that is on this map here, the Kenilworth being the top seam, which money was expended to develop this particular territory in this particular seam, the Aberdeen seam, in the land in con-
[fol. 413] troversy. We tunneled some 1100 feet in the land in controversy. You understand it is a solid rock tunnel to intercept the coal as the coal is coming down on a 9 degree or a 9% pitch, 9 feet to the hundred, whereas the tunnel comes in horizontal, cutting both seams. We are driving a tunnel in there in order to develop that coal. The tunnel was driven in until it hit the top of the seam of coal. This map is 500 feet to the inch. I would say it enters that land about 1100 feet. The cost of that tunnel to the Independent was a trifle over $100,000.00. That was all made in

reliance upon this title. We didn't get any coal in driving the tunnel, but we did get some coal by reason of having driven the tunnel. I would say roughly that we got 100,000 tons out of the land in controversy. That is only approximate. I would have to have it calculated. You see this tunnel was driven to develop this whole territory. Approximately 100,000 tons is the best estimate of the coal removed from the land in controversy that I could give at this time. This tunnel is an improvement. It makes the property workable. The company has expended over $100,000.00 in putting it in there for the purpose of intercepting this coal. A part of this land is reached by another tunnel which is over 8,000 feet in. That is not in the land in controversy. It is to develop the land. We wouldn't have driven it if we hadn't had that land. That is a solid rock tunnel. Some of it goes in the coal. It cost over $260,000.00 odd dollars. We would never have driven that tunnel if we hadn't thought we had acquired the lands in controversy, because we could reach all our land in No. 1 and develop it from this slope here and take it out on the surface; but to reach these lands here on the lower reaches from here down in the Kenilworth, this tunnel would be necessary. When I say here, I mean the lands in controversy. All of this work was done prior to the bringing of this suit. The No. 2 tunnel was completed. No. 1 tunnel was completed to the Aberdeen seam which is here, and was driving on to the Kenilworth seam, the top seam which is here. It was finished some time in 1924. I can't give you the exact date. Practically all of it had been done prior to the commencement of this action.

Mr. Wilson: The purpose of this Exhibit G is to illustrate the evidence.

The Court: It is admitted for that purpose.

Witness: I am familiar up to a certain time with the facts and the figures from the books of the company that the taxes were paid upon the land in controversy in the same way that the company paid taxes upon its other [fol. 414] lands, up until 1924, when there was an agreement made with the state about the taxes with the state officials on account of the pendency of this suit. I felt and the other members of the Board of Directors of the Independent Coal and Coke Company felt that any claim

of equity by the United States had been satisfied by the new deal made by the Milners with the State of Utah and the issuance of the patent and the report of our attorneys that we had employed.

Cross-examination.

By Mr. Lacy:

The 100,000 tons of coal taken from under this land have been gradually worked. We started development as soon as our tunnel reached the top seam. We started driving entries, as soon as the tunnel reached the top seam. I think in 1922. It has been mined daily from the time we hit it until now. We have never withdrawn from that land. I couldn't give any definite estimate of what portion of that total has been taken out since May 16, 1924. It would be a matter of calculation. It could be calculated. No. 2 tunnel is the tunnel running up to the land in question. That tunnel does not afford an opportunity to develop other coal than what is on the land in question here. The development from this side is all from this No. 1 tunnel. This tunnel is strictly for the development of coal from that land. Yes sir, No. 1 tunnel was driven for the purpose of development of coal from that particular tract of land. I explained to you there were 165 feet vertically between the seams. Now at 9% it allows a big block of coal. To go from this tunnel in No. 2 we would have to go down with a slope of 9% dip to extract this coal. Now by driving this tunnel on out through a lower elevation, practically 200 feet lower in elevation, that means practically 1800 feet on the pitch, we reach this territory here. No sir, all our development is not on No. 2 tunnel. I take this coal out here owing to the level near the tipple lower than the tunnel, No. 2 tipple. All this haulage is in No. 2. It goes out here and is carried down this tunnel over an incline up a heavy incline requiring an engine load. This tunnel is driven on a 1¾% grade in favor of the load, so that every pound of this coal is hauled out of this tunnel here. No. 1 tunnel is now used for ventilation in conducting through fresh air. We can develop this land that we acquired from the Government through No. 1 tunnel.

The vein that I refer to as the Aberdeen vein is known as the Castle Gate vein also, the Castle Gate vein A. The Kenilworth vein is 165 feet above the Castle Gate vein. The thickness in our workings there of the Castle Gate vein will average 16 feet. It will average that in the lands [fol. 415] in question so far as we worked it. The thickness of the Kenilworth vein is about 14 feet. I have not made an estimate of the coal on this 1120 acres of land to get the content. I have for the 1500 acres. I couldn't give it in tons, figures. It is very easily calculated. We take a thousand tons a foot acre for coverage, and you have got 1520 acres with 30 feet of coal. It would be 30 by 1000, a mathematical proposition. As to the coal averaging about the same over the entire 1520-acre tract that is something I can't tell. We don't know about that. If you ask me its average over the portion that we have worked, now I can assume that it will average the same over the 1500, yes sir. We did not make an estimate of the coal content of the entire tract. For purposes of our own we did make an estimate of what we hoped it would be in mining, laying our plans out. For example, in this entry in here that coal is thinned down now to 6½ feet. Sometimes it will go out entirely. By going out, I mean run into burning. Yes, on this particular tract of land we have indications of burning over in here on the top seam. We haven't found any pinchouts yet. The burning I have described is on the outcrop. It is not on the land in question. It is coming right into the land in question. It is not there yet because we are not working there yet. I have seen evidence of burning on the land in question. It comes out on the mountain. I couldn't find out whether the land was burnt. That is on the Aberdeen and on the Kenilworth veins. We don't know the extent of the burning. No sir, not until we get further in working it. For example, in this country there is over a section that has been lost to us by the burning. It is burnt here. I have gone in over a thousand feet. That is country to the west of this land in question.

Redirect examination.

By Mr. Wilson:

I cannot tell with a reasonable certainty just what extent we will find this land burnt out until we actually go into it

and work it. Nobody can. The proof of the pudding is in the eating of it, and the proof of mining is in the working. That is generally true of coal mines. I have had 40 years experience in coal operations, in Pennsylvania, British Columbia, Illinois and Utah.

My theory of what causes burning would be that in early history fires have started and this was attacked from the top. It is quite hot. When we first opened up this property we opened it right in good coal and the coal was hot, and then almost immediately when they started with the [fol. 416] laterals they hit the burning. They have found that one little spot, and here is the course of it as it went down, went under cover, under the cropping of this land here, so that it is burnt for over a thousand feet, must have been burning for ages. I can't tell what the extent of the burning is. Yes sir, it burned every pound of coal that is in it. The coal has been burned to a very fine ash and both the rocks have broken, so that it is absolutely worthless. It is still burning. You can find evidences of heat in it, and we simply seal it up with a cement wall to cut the air away from that. Somewhere in depth it is burning still. The only way that can be determined is by driving into it or by a diamond drill. A person going over the ground and looking at it this way or the other can tell absolutely nothing about it as to the burning. His opinion is not worth anything. I wouldn't give one. No sir, you can't say, Mr. Wilson, that by a mere inspection of this ground. It is pretty hard for one to say whether it contains coal that is commercially possible to work. The coal can be worked and inspected on the cropping and determined whether the coal is commercial. You cannot do that where burning occurs. This burning is a rather unusual condition. The western states are about the only places where we encounter it. It is quite common in Carbon County and in parts of Colorado. I wouldn't say that it makes it impossible for a man to render an opinion from mere inspection where he finds evidence of that burning and runs into it because one man's guess is as good as another's as to how far this burning goes. If you have a cropping of sufficient thickness that indicates there has been commercial coal there and you are willing to take a gamble on the extent of this burning, I would say you could tell whether there would be commercial

coal beyond it or not. You are taking a gamble. You have no absolute knowledge about it.

Thereupon Exhibit H was handed to the witness.

Yes sir, I would say that was the original deed.

[fol. 417] DEFENDANT'S EXHIBIT H,

offered and received in evidence, is in words and figures as follows:

"Ex. H, Deft.

Warranty Deed.

Carbon County Land Company, Grantor, a corporation, organized and existing under the laws of the State of Utah, hereby conveys and warrants to the Independent Coal & Coke Company, Grantee, a corporation organized and existing under the laws of the State of Wyoming, and doing business in the State of Utah, for a consideration of Five Hundred Thousand (500,000) shares of the capital stock of the grantee and its assumption of the debt hereinafter mentioned, the following described tracts of land situated in Carbon County, State of Utah, particularly described as follows, to-wit:

"All of Section 3; the west one-half of Section 2; the north one-half of Section 10; the east one-half of the southeast quarter of Section 10; and the northwest quarter of Section 11; all in Township 13 South, Range 10 East, Salt Lake Meridian.

"It is understood and agreed that of the aforesaid tracts of land all of Section 3, and the north half of Section 10, and the northwest quarter of Section 11, containing One Thousand, One Hundred and Twenty (1,120) acres are, with other lands not herein described, included in and covered by that certain mortgage dated January 2, A. D. 1920, in favor of the State of Utah, and recorded in the records of Carbon County, Utah, in Book 'G' of Mortgages at page 350, securing an indebtedness of Five Hundred and Fifty-six Thousand, Four Hundred and Twenty-eight Dollars ($556,428.00), which indebtedness stands against the lands described in said mortgage on the basis of One Hundred Dollars ($100.00) per acre; One Hundred and Twelve Thousand Dollars ($112,000.00) of said indebtedness standing

against the said 1,120 acres of land last above described.

"And it is further understood and agreed that the said 1,120 acres of land is granted by the grantor herein and accepted by the grantee herein subject to said mortgage indebtedness of $112,000.00 which said mortgage indebtedness the grantee herein assumes and agrees to pay.

The grantor covenants and agrees that the State of Utah will release and discharge the said 1,120 acres of land from the operation of said mortgage upon the grantee herein paying the said indebtedness of $112,000.00, together with such interest as may accrue thereon.

[fol. 418] "In Witness Whereof, the said Carbon County Land Company has hereunto caused its corporate name to be signed and its corporate seal to be affixed, and the same to be attested by the signature of"

(Signed) "A. C. Milner, its president, and"
(Signed) "E. Stanley Pratt, Its Secretary, Thereunto Duly Authorized on This 16th day of October, A. D. 1920. Carbon County Land Company, by (Signed) A. C. Milner, Its President. by (Signed) E. Stanley Pratt, Its Secretary. (Corporate Seal.)

"Witness: (Signed) Geo. N. Lawrence."

"STATE OF UTAH,
County of Salt Lake, ss:

"On the 16th day of October, A. D. 1920, personally appeared before me A. C. Milner, who being by me duly sworn did say: That he is the president of the Carbon County Land Company, and that this instrument was signed in behalf of said corporation by authority of its by-laws and by resolution of its Board of Directors, and the said A. C. Milner acknowledged to me that said corporation executed the same."

(Signed) "Geo. N. Lawrence, Notary Public, Salt Lake County, Utah. My commission expires October 23rd, 1923." (Seal.)

(Cancelled revenue stamps affixed to the sum of $450.00.)

Examination by Mr. Parker:

Yes sir, by examination of the outcrop at a burnt point I said you could tell there was coal back, except for this

chance of burning. I would say that at No. 1 where the big crop is exposed, if I was figuring on using that as a coal mine I would take a look at the rocks there, the pitch of the rocks there and measure it, a very good reason for determining coal back of it, without making any further investigation. The evidence of burning make it very uncertain as to the quantity of coal. Here we have lost one entire quarter section. There is a half section that has not got a pound of coal in it. No sir, if there didn't appear any evidence of burning at the outcrop, there might not be burning back of the outcrop. I would think that the burning would [fol. 419] show itself at the outcrop. According to that formation out there in Carbon County we might well run on to what we call a want. You couldn't very well determine the existence of it. That is another gamble that you would take. No sir, that is a different thing from the burning. That is an intrusion of foreign matter or rock into this coal into its early history that has just absolutely excluded the coal, just like a foreign matter dropping into a bowl of soft mush, or something of that kind; the foreign matter would be there. Making an examination of that land preparatory to going on it and mining it for coal, I don't confine my investigation to a mere examination of the outcrop. I am interested in pitch, in finding out whether the rocks are in place, whether the rock has been distorted or faulted, if I could find out. In many instances I can find out from a mere surface examination, because the same character or rock will be found perched above or below, dropped or slipped off, and the fault would be very prominent. Sometimes you can see it in the territory throughout the country. If there were a fault, you can observe the fault. You couldn't tell anything about a want. Wants are not very common in that country over there. They are over in Spring Canyon, but we haven't encountered a want except wants that have been caused by burning. I was not familiar with the workings there prior to coming to Utah in 1919. I know when this No. 1 mine was opened up from the records. The records show it was opened in 1906. Workings began in the vicinity of where I am mining now according to the records in 1906. I only know from my records. I don't know anything back in 1906. There are openings in the vicinity but no working property, no mines, besides the Independent Coal and Coke Company.

Examination by Mr. King:

I have not been entirely over that 1120 acres of land acquired from the Carbon County Land Company. I have been on quite a little of it. There are no coal croppings on any part of it. Prior to acquiring that 1120 acres of ground, the ground my company owned was the face of this escarpment where the coal crops. This ground that we acquired from the Carbon County Land Company all laid back north of this escarpment. To get into this land it had to be developed, at least if it was to be mined economically, from the escarpment, going from this cropping into that ground. As you rode over the surface of that ground, there was nothing to show the existence of coal. It was at least a quarter of a mile from the escarpment back [fol. 420] to any part of the land which we had acquired from the Carbon County Land Company. The greater portion of it extended back there for a mile or two miles.

Mr. Lacy: I would like to inquire what the object of this cross-examination is. Is it to prove this land is non-coal?

Mr. King: It is to show there were no coal croppings or croppings of coal on any part or portion of this land.

Mr. Lacy: I am going to object to this line of examination on the part of the Carbon County Land Company.

The Court: I am inclined to say that I will hold with you so far as the Carbon County Land Company is concerned, but I shall permit an examination of that sort so as to benefit everybody.

I referred today briefly to the fact that seams or veins pinched out as I come back from the croppings on the surface. They don't feather down until there was nothing left at all. The one I referred to is pinched down to 6 feet. Yes, sir, from my experience there are many instances where you have a cropping on the surface, where it crops upon the escarpment and as you go get back in some considerable distance, sometimes a quarter of a mile or a half mile, you find no coal at all. That is what Mr. Parker referred to as a want. It is an intrusion. These wants are intrusions that cut out a certain portion, sometimes a considerable acreage, but the coal will come in again. Yes sir I know in some instances places will be found where those wants have been encountered a thousand feet in extent. From a mere examination of the surface of the ground, you never can

determine anything with respect to the burnt out condition as to what is shows behind the escarpment. You can't tell anything about the condition of these wants or their extent. Take any portion of these 1120 acres that I refer to here. If you get back a distance you don't know as to whether there is any coal there or not. It can only be determined by the extent of your workings and by diamond drilling.

Examination by Mr. Parker:

We bought that land as a result of our No. 1 workings, also this slope here. This slope here goes down in good quality. Our experience is that that slope was a very fine quality of coal that represented work, actual work. My work on these 1120 acres is a result of the development of my predecessor.

[fol. 421] Examination by Mr. Wilson:

That development has been taking place along prior to our coming into our present condition. As to the reasons why we bought this land, my reasons therefor were that I figured that the company had an investment that it never would be able to amortize with the amount of land that they had. They had gone ahead at Bull Hollow and made very considerable investment for the quantity of coal land that they had and then to get the tonnage that I wanted to get, to make a paying proposition out of this, in my judgment I needed to acquire more land and a larger tonnage. I had been informed definitely that the vein ran under that section there from the workings that had been made by me. The Edwards 40 was the stop. The Edwards 40 was where the workings stopped and at the time that I came into the management of this company. My conclusion that there was coal in the land was worked out upon the development shown by the workings of my predecessors, rather than anything else. That is on that land.

Recross-examination.

By Mr. Lacy:

It is part of good business and customary for coal companies to open the land on the outcrop mined at the outcrop or from the outcrop to acquire land further back of the

same ground, for their own protection. Yes, sir, that was my idea in acquiring this land. Well, I knew it was coal.

Re-examination.

By Mr. King:

I understood that these 1120 acres were only shown to be of commercial value by reason of the development done in the land adjacent to it by my predecessors. By reason of the extended development work in the area there lately it shows since then the continuity of the vein. And it was for that reason that I acquired this land by reason of the development there, because as I then figured I would find it might continue on in.

Recross-examination.

By Mr. Lacy:

It was not necessary to take into consideration that the vein was on that escarpment, the outcropping, that there was evidence of coal along the escarpment, along through that entire country. We have all of these intrusions here and these slopes going down. Nowhere had we developed the ground. Well, the outcrop is unquestionably there on its face for a great many miles along the cliffs, but the out crop was burned. There therefore had to be better evidence than that outcrop. I have examined Bull Hollow. [fol. 422] I have been in what is called Cordingly Canyon, and I knew the outcrops in these canyons.

Re-examination by Mr. Wilson:

Some of those outcrops were burnt and some were not. Yes, I have answered counsel. If the only information I had was what I saw from the outcrop, I would not have been anxious to get that land at all.

F. W. Nixon, produced as a witness on behalf of the defendant, being duly sworn, testified as follows:

I am the secretary of the Independent Coal and Coke Company, which is a Wyoming corporation. I have not the exact date, but I think I became secretary about 1924. I was connected with the Independent Coal and Coke Company when you became its attorney in 1919. I have been

connected with it since September, 1910. It was called the Edwards-Strevall administration, immediately preceding Mr. Tonkin. The Strevall-Patterson administration was in when I went there in 1910. The company was operating its coal mines in Carbon County, Utah, at the time I first became connected with it in 1910, and has been operating them since, getting out coal and selling coal each year, without any stop or cessation for any considerable length of time. I have had charge of the same department, the office, during that time in one way or another. I recall when the articles of incorporation were amended in 1920 and its capital stock increased about the time this Milner or Carbon County land was acquired by the company. I recall the issuance of 500,000 shares of stock mentioned in your testimony. Five hundred thousand shares were issued and delivered. That stock went out and is now held as outstanding stock of the company. A great deal of it was sold and changed into other ownership. Some of it has been changed. As I recall the Carbon County Land Company now has 70,000 shares of that original issue of 500,000 shares. Yes sir, you were mistaken about that. It was 70,000. According to our records that is all of the capital stock of this issue that the Carbon County Land Company has on the books of the Independent Coal and Coke Company. The rest of this 500,000 shares has been sold to the Carbon County Land Company to its various transferees and new certificates issued, so that it is now held by many different people. The par value of that stock at the time it was issued was $1.00. It would be very hard for me to determine its market value at that time. I would say around 60c a share at the time, at least that. What I speak of now is the price [fol. 423] the stock had been selling for at actual sale. I can't recall right now any stock being sold for less than 60c a share. It is my recollection that is about what some of it sold for at that time. As to dividends, we started in 1911 paying dividends and there have been a few periods that they have not been paid since that time, very few. I would say not less than six periods altogether. There have been a few periods that have been omitted since 1920. Generally speaking the dividends paid on this stock have been 6% per annum on the par value. These 500,000 shares that were issued to the Carbon County Land Company were treated in just the same way as any other outstanding

stock. We have just one stock, that is common stock, and the dividends paid on the stock issued for the consideration of this deed were just the same as paid upon any other stock. Yes sir, I furnished the statement that you introduced in evidence relative to the payment of taxes upon this land which is approximately $39,000.00 shown in taxes paid up to 1924. The State Board of Equalization has given their consent that the taxes be withheld pending the result of this suit. That is the reason they have not been paid since 1924. The company has at all times been ready, willing and able to pay those taxes upon this land, if this suit had been removed. We have set up a fund for that purpose, which is on our books. It is held there for that purpose. The interest on that $112,000.00 mortgage that we assumed, segregated out from the $556,000.00 mortgage, was not paid in 1925 for the same reason that the taxes were not paid. The whole matter was pending, awaiting the result of this suit. The suit was started May 16, 1924, and after that everything has been withheld, both interest and taxes. I have a certificate of patent from the State of Utah to the Carbon County Land Company.

Mr. Wilson: I will join in offering Exhibit 20.

Mr. Lacy: We did offer it.

Mr. King: We join in it and want the record to show that it was offered on behalf of the Carbon County Land Company.

(Exhibit 20 included in plaintiff's evidence.)

Mr. King: That was recorded February 4, 1920, recorded in Book 2-A, Page 38, in the office of the Recorder of Carbon County.

[fol. 424] Examination by Mr. Parker:

I can't recall the terms as to the due date of any of the principal sum of $112,000.00. If the title is adjusted here and confirmed in the deed of our company, then we stand ready and willing and able to pay the State of Utah all the payments that are due, including interest and likewise the taxes that are due the state.

Cross-examination.

By Mr. Lacy:

Yes, we have a right to make payments if I remember correctly and stop the interest, prior to 1930. The due date of the note as I recall it is 1930 or 1940.

MARK HOPKINS, produced as a witness on behalf of the State of Utah, being duly sworn, testified as follows:

Direct examination.

By Mr. Parker:

I live in Salt Lake City, and am 67 years of age. I am a mining engineer and geologist. I have been engaged in that business all my life, all my business life. My operations generally have been from Pennsylvania originally to places in Wyoming, Colorado and Utah. The principal corporation that I was associated with was the Union Pacific Company. I had charge of their coal operations in Colorado, Utah and Wyoming. It was the Union Pacific Coal Department of the railroad. They had their mines at Scofield, and Grass Creek in the State of Utah. Grass Creek is a tributary of the Weber. It is just above Echo. They only have the one mine in Carbon County. I had charge of all of the mines. I made an examination for the Union Pacific Coal Company preparatory to acquiring new coal lands where needed. I have had occasion during my experience to study the various coal formations in Carbon County. I have made studies out in Carbon County for other parties since I ceased to work for the Union Coal Company. I first went into Carbon County for the purpose of studying the coal lands or performing any other duties in connection with the coal business about 1890, somewhere in that neighborhood. I am acquainted with the towns of Castle Gate, Price, Sunnyside and that vicinity. There were no mines worked even at Castle Gate the first time I went in there. The Castle Gate mine was being developed about that time, about 1890. The Castle Gate mine was opened up. Some individuals offered it to the Union Pacific for sale and I looked the property over and turned it down.

Castle Gate is the oldest mine on that outcrop. I should say about 15 miles away from this land in question. I have [fol. 425] not had occasion to study this formation and these lands here in this case along the Book cliffs. That was in behalf of the Utah Fuel Company in 1907 and 1908, we made a special study of the entire outcrop fronting Castle Gate.

Questions by the Court:

Q. I would like to get that straight. This outcrop that he said the Castle Gate mine is on, is that the same outcrop that comes through this?

A. Yes sir.

Q. And through the land in question?

A. Yes sir.

Q. The outcrop extends east and west?

A. Well, it is rudely circular in form.

Q. About what is the length of it?

A. Absolutely of the outcrop, I presume it is about anyway 250 to 300 miles long.

Q. All in Carbon County?

A. And Emery.

Examination by Mr. Parker continued:

Through these studies I became familiar with the land involved in this case, the Book cliffs that run up there and the outcrops in the vicinity of these lands, the rocks that accompany these formations. I have examined the map that is on the board here that is referred to here as Exhibit 2. What is called Bull Canyon on the map is familiar to me. That name though is Bull Hollow. I know it is Bull Hollow. I recognize Cordingly Canyon. That is familiar to me, and also Dead Man's Canyon. I have been in each of these canyons, also Coal Canyon farther to the east. I call attention to the fact that roads are shown practically going up each one of these canyons, and that the main road to the reservation to Price goes up this Soldier Canyon, and crosses the ridge. As to the first time I had occasion to become familiar with these canyons and the lands in the immediate vicinity, there was the land case known as I recollect it as the McDonald case, which occurred about the time the Sweet people had made an entry of the land in

this vicinity and there was a contest between McDonald and the Sweet people as to the character of the land; and I would say that was probably around 1905 or possibly 1906. At that time no mines had been opened up in the [fol. 426] immediate vicinity of these lands in question. Mr. Sweet was driving a tunnel upon an outcrop in Bull Hollow and that tunnel I believe was in from the surface practically eight or nine hundred feet, at least still in the burnt condition existing. There was an opening in Cordingly Canyon on the outcrop. I don't just recall the name of the prospect. It was not a mine. It was a prospect. I was familiar with the ledges that run over the land and in front of the land in question in this case. The land in this case is not on the outcrop. As to how far the outcrop and the escarpment generally are from the land in question in this case, I would think from the resume of this exhibit here if Joseph Taft's outline there is correct. I am not familiar enough with the land in question and that ground, not having seen the various corners and that sort of thing. I can't testify to that and I don't think anybody can. Well, by taking the present development there it strikes me at least in some portion of that entry there was no question about its present character. You couldn't say placing yourself back at the time that I first went out, taking into consideration the evidences that existed there on and prior to 1904 and prior to 1905, whether or not from an examination of that outcrop present there that you could say that the coal presented by this outcrop ran back and dipped back as far back as these lands are located. You couldn't say that unless you followed the geological survey of the United States, went on geological inference to do that. I mean by that answer exactly what I have stated.

I don't claim to be familiar with that land prior to 1905. Yes sir, I went out there in 1905. We have the mesa verde coal horizon. As to what I mean by that—well, the cretaceous coals, the western coals are all practically in the cretaceous geological period. This mesa verde is the particular part of the cretaceous period which carries the coal veins that are now worked both in Wyoming and Colorado and in Utah. That formation used to be called the Laramie formation from the fact of the characteristic condition existing at Laramie, Wyoming. Now I will say that in that connection exactly where that characteristic formation

exists here as noted, there is no coal mining in the entire formation. As to whether or not you could tell where the land was far removed from the escarpment as they are in this case by an examination of the outcrop as to how far back the mineral projected into the land, it is my recollection that I stated that that was usually done by geological inference. That is a broad question. I don't think the court wants a geological lecture.

[fol. 427] Well, to trace it from a geological standpoint and a commercial standpoint, it is necessary to go into the facts as to the building up of these wants in order to make it intelligible. There were practically no conditions over there geologically that would tell or not tell as to whether this coal outcrop extended back into the hill, none except by the use of geological inference. As to the inferences which would appear and the geological facts from which you drew the inference, you have present a strata that could contain coal. That is the outcrop, and it may go back. The outcrop in this case absolutely is somewhere within a quarter of a mile or half a mile of the land in question. Now as to how far that outcrop vein might exist is uncertain. There comes in your inference. If you infer that it does go back, then you say this is coal land. If you infer it does not go back, you say it is not coal land. Exactly so, it all depends then on inference. It is a question of personality. While we are on that, I would like to say this—some people imagine that geology is an exact science. It is remarkably not an exact science, depending on the individual as you suggest. Something like the law, yes, you may say that. The coal formation is exposed. There are no surface conditions there that warrant as far as I know the inference that there is or is not coal, because you have got a large area there of burnt outcrop where you do not see the physical conditions of the vein itself because it has been burnt up just the same as if you put a hod of coal in the stove, because it is gone. You don't know what kind of coal it was after it is burnt. Now you have got that condition which is a natural inference that you can draw from the fact that under certain conditions down there and in certain portions on this same outcrop that you find workable coal veins of the proper quality and that sort of thing to make it marketable. Now as a rule geological inference has been very costly in a merchantable way; that is, a great

many people have gone on inference and have been disappointed and lost their money, by reason of not finding marketable coal. Yes, that is true in any mining game. As stated, I merely illustrate what the geological inference means, what it entails if you follow it.

Yes, oh yes indeed in my experience in this vicinity of this land in Carbon County I have found conditions something like that that there was an outcrop of coal and then later that outcrop was opened up and the vein pursued and then later pinched out. That condition is peculiar to the cretaceous coal formation. It is a rule rather than an exception. All of these coals in Carbon County are cretaceous. By what I mean by the word "cretaceous"—well [fol. 428] you are sending me back into a geological discussion now, but I would like to say this that the text books and about everything we have on coal formations is based on the carboniferous. Now that formation is supposed to be a great many million years in the formative period of the earth and is supposed to be rather ancient. The climatic conditions at the time of the laying down of those coals were such that you don't have these cataclysmic winds and floods and all those things. You must always remember that coal is a water formation, that is, it occurs in swamps under those conditions. Also its surrounding rocks are merely debris that has been deposited there by water.

It is a long story but veins of coal being laid down in a swamp is supposed to be originally black cretaceous mud afterwards condensed through pressure and so forth. Now I have been diverted in a way from the period question, or the era question. It is this, that with your equable climate and little disturbance your deposits of coal under those conditions are practically undisturbed, and uniform over large areas.

Now then if you go on from that carboniferous period you go in through the Triassic and Jurassic and into the cretaceous and disappearing, and that cretaceous is where we get our western coal from.

Now if there was a period disturbance, a climatic disturbance, consequently we find wants. We find our coal deposits in rudely circular areas, pancake fashion, regularly thick in the middle. That is what it is. It is peculiarly characteristic of the mountain coals or the cretaceous

coals, and I would say that is one of the faults and uncertainties which we have to meet in the coal mining operations in these mountain states; consequently if we want to really know what we are doing, we go on and drive the area or we develop it by prospecting or we develop it in a number of ways, by drifting into it such as our friend here in the developing of this land. He says he knew there was some coal there because the property worked up to the lines. Mr. Tonkin told us that here this morning. He was asked I believe how he knew there was any coal there and he said "why we worked up against it. We knew it was there" in this 40 or 50 acres. He can't tell you whether the balance of that 1100 acres, whatever it was. He can't tell you at all as to what he knows as to whether he will find that continuation up through that 1100 acres without using that geological inference, which is no safe basis of operation. It is based, however, on facts that he already [fol. 429] knows by reason of operation. In other words inference means what it says. You get certain facts and then base a deduction upon those facts. Then you are reasonably certain of the result. If you base an inference upon an inference you don't get a result either in law or geology or anything else, nor in commercializing these inferences, having in mind the particular lands and the conditions there present before the developments were made, that is in 1905. My opinion as to whether or not these lands involved in this case were at that time known coal mineral lands is that they were not. I would say in my opinion that a prudent coal miner would not be justified with the evidence present there at that time, that is the cliffs, the escarpment and the outcrops and other conditions you have discribed, in pursuance of those showings there to go upon the land and spend money in the development of it, with this qualification. Now if he infers that because you have a sandstone horizon or floor of a coal series, and if the inference was followed, that that of necessity meant a workable coal vein of a particular quality and without shales or other interferences, I would call your attention to the fact that you have a certain number of coal formations especially along that outcrop, and they don't as a rule crowd one another. They are miles apart. Well what is

the matter with the interval between those operations, they merely have found good conditions where the mine exists, and the inference that everything in between those mines is good is entirely wrong, not warranted. I would say on the investment of several hundred thousand dollars or half a million, which is entailed in the development of a coal mine, that in addition to examining the outcrops and examining the geological conditions, that a prudent miner would be required to go upon the ground itself and drill. As to whether that is particularly true where the land in question is back say a quarter of a mile or half a mile or a mile from the escarpment, you can't limit the distance. It is all hidden. The Government attempts to limit it to three or four miles or five or something of that kind. That is I mean the Government geologists in their estimation of the coal field down there. They use that, but where anything is absolutely hidden and knowing these vagaries of deposition I would say you are not warranted in going half a mile, that is with any surety of getting what you expect to get or what you wanted to get.

Yes sir, I have had experience with reference to this situation that I have described in the development of a want, where there was a fair showing at the outcrop. That was in Utah at Coalville. I started in on a favorable outcrop and I sunk about 300 feet, something like that, on a [fol. 430] 20 degree pitch with coal in good condition and I was spending my own money and I ran into a want. Yes sir, up in Summit County, and I drove out of coal across this old stream that had meandered through that swamp full of mud, coal mud and it washed away the mud and left the sand debris. That is a want, and I was endeavoring to get across that, and I studied the stream considerably to see how I was getting along all the time and now I never did get across that. I drove about 700 or 800 feet on an incline and tried to get across that and never got across it. I finally abandoned the work. Burnt coal goes to the surface.

Now explaining the question that was asked me this morning regarding that burnt coal effect, you see you have got a style of generating plant there that extracts the oils and the hydro-carbons and the gases from the coal and it feeds with very little addition of oxygen and it feeds that fire and you keep on extracting these constituents. That

coal is all very inflammable you see, and you go on and on and on. I have seen areas half a mile across that have been absolutely burnt completely. It is true that they were exposed on two sides. The burnt coal was exposed on two sides, and the entire area on that piece of ground and that mine was absolutely worthless so far as utilizing the coal was concerned, because it was gone, burnt up. I had an experience of that kind that I have just described not near this property but further around the same outcrop. It was at Moreland, Utah. Well, the Moreland operation is situated on Cedar Creek in Emery County and that originally was put in at a point on the creek about say two thousand feet above a condition where a branch put off as you went up the creek, put off to the right of the lefthand point between the main creek and this branch and then followed around at that point and it happened to be properly set geologically and in the right horizon and it carried a splendid vein of coal. My recollection was it was 18 or 20 feet thick, clean and in good shape, and there were openings on three sides of that area and they started mining and drove northerly as I recollect up on the strike of the coal, going up and across to another point which was on the branch of this creek around the other side of the hill, and they had not driven but a very few hundred feet into that hill before they came to a want, and they drove across that entire point, a matter of over a quarter of a mile or one-third of a mile, and they drove within about as I recollect up within 200 feet of that splendid showing on the other side and in all that period, on all that territory they were in this want. [fol. 431] Now in that case and in most every case there are no physical or geological conditions which will permit you to say here is a want and here is not a want.

Yes, this escarpment, these same book cliffs run in a south or an easterly direction from these lands clear to Sunnyside and beyond Sunnyside. Yes, the same geological horizon and the same sand rocks continue to Green River down the Price River Canyon below Woodside about two or three miles below Horse Canyon which is about eight miles below Sunnyside. Without following the undulations of the outcrop it would be a matter of 25 miles I would say, and in that entire showing, so far as prospecting or looking the thing over, I don't know of a condition which would warrant the opening of a coal mine. That is the

same general escarpment. Further than that I will say this too, Judge, as you go south it seems that the area around Castle Gate north of there, the best coal measures with the Sunnyside shales; the same coal are considerably thicker than they are as you go south. Now at Sunnyside, for instance, there is only one vein of coal. The measures thin down, however, well at Castle Gate, and I would say this producing measure is possibly 600 feet thick, while at Sunnyside it is about 200, an entire absence of anything but the one vein of coal. Soldier Canyon is about two miles east from the eastern portion of these lands. I have been through Soldier Canyon carefully. There have been no coal mines or coal outcrops developed in that canyon at all to my knowledge. I want to say this about these vagaries that I have talked about in this cretaceous deposition. I want to say that I can name you several areas or coal towns that were large camps in Wyoming, and at least one in Utah that are abandoned merely because the coal played out. Almy is one of them, and Carbon, Wyoming, was another. All of these conditions that are named here, geological conditions, were present there, absolutely. There was coal, lots of it at one time. The burning up at Almy is local. It has been set on fire up there through explosions and that sort of thing, but you asked this morning what was the general reason for the burning of these coal veins. It would seem that the cause of that is probably from the sky. It was from lightning. You have got cedar trees and pinion pines along your outcrops there with the roots absolutely in the coal vein and the outcrop in places, and now if a tree like that was struck by lightning and struck on fire that fire could communicate itself to the coal vein, and the burning has been so ancient that I am inclined to believe that you can't lay that to human beings; you have got to account for it in some such a way as I have stated. This [fol. 432] Almy situation is due to operating conditions.

Examination by Mr. King:

The government Exhibit 2 shows the escarpment here and the lands which are in question anywhere from a half mile back to two or three miles back in purple. As to the question whether if knowing the escarpment and having the coal indications on the escarpment, with the knowledge of burning to be found in that section of the county, there

is any assurance of coal in marketable quantities at any place half a mile back or whether it could be determined without a diamond drill or the sinking of shafts; if that entails an answer as to the absence of absolute facts that that condition of coal continues half a mile or a mile or two miles away from the outcrop I would say that it could not be determined except by actual determination.

Cross-examination.

By Mr. Lacy:

That fact could only be known from developing or exploring the veins back there. I have so stated. The evidence at the outcrop of these escarpments of coal would not be conclusive to my mind that there was coal back half a mile from the outcrop except through development. For instance, I would have to state, and I did it in the McDonald case, that coal similarly situated to that at the head of Bull Hollow at the time in 1905 I said I didn't consider it a valuable coal land, and I have not in all these years since this year really found anything that changed my opinion regarding that condition. Yes, certainly, when I testified that in my opinion that land back from the escarpment is not known coal land, that is because it had not been developed so that you can see or determine what it is without going into it or drilling. In other words, I want to restate that geological inference has and is costing capital, or people with money, costing them considerable money and cost me personally. There can be no such thing as known coal land from geological inference in the cretaceous formation. There are no cretaceous coals east of the Rocky Mountains so far as I know. All of the cretaceous coals are in the Rocky Mountains and west of the Rocky Mountains. No sir, I made no such examination of the land in question as to be able to say how many evidences of burning and of outcrops there were on this land. That would be a matter of absolute survey in order to make any such statement. Going back to 1906 on this particular land as to the outcrops and evidences of burning being an indication that it was underlaid with this vein of coal that out- [fol. 433] cropped on the escarpment, I would naturally say that some coal had been present. As to its cleanliness or as to its marketable value or the thickness of the vein

even, that is almost impossible to say. I tried at one time to figure out from the ash present the possible thickness of the vein that had existed. Now I found that probably the vein might have been a little dirty and the amount of ash of course would be consequently increased. If you take a normal ash as a basis you get a good deal thicker vein of coal than you are entitled to. As to the outcrops on the land itself in the canyons there and taking into consideration the tilt of the coal veins and the probability of those veins showing on the escarpment extending under those lands, I can perhaps explain that better to you if you will allow me to do it in just a few words; and it is merely this, that the whole structure there has been a doming structure. It is called the San Rafael swell, and that dome has been eroded and it was the heart of that coal field, and you have this rudely circular fringe which is the residue left after the erosion that is not original. That is not the original outcrop at all. It is merely the remnant of the present outcrop and the book cliffs as we speak of it.

Now if you are guessing at things from merely a remnant of the formation as to the coal that was there originally, you can say that you are making a long guess. That is another thing. I want to say that you in this rudely circular outcrop of several hundred miles, you will find, no matter at what point you arrive on, that rudely circular outcrop that that coal is dipping away from this particular center. That in other words it is just dipping into the hollows. It may be over here and it may be over there. Here it is north and here it is west, but it is the remnants of that doming, and the little fringe that is left on the outside.

I would say that it was possible that those veins showing on the escarpment extended under those lands. I would take into consideration that there were some evidences of the outcrop or burning in that canyon on this particular land in question, corresponding with the tilt of the coal. I would consider that it was good prospecting territory.

Whereupon the testimony of P. S. Sowers, witness who testified in the case of United States v. Truth A. Milner et al., was offered in evidence on the part of defendants, Independent Coal and *Company* Company, as follows:

[fol. 434] Direct examination.

By Mr. Edwards:

My name is P. S. Sowers. I am engaged — promoting more than anything else now. I am not in any way an employe of the United States Government at present. I was special agent of the Land Office for some time. I believe from 1900 until three years and a half ago. I was a special agent of the General Land Office. Under my duties at that time I was doing the duty now required and done by the Forest Reserve officers in this state, examining the lands taken for mineral purposes, located for mineral purposes, following up timber depredation, homesteads, and all pertaining to lands of the United States in this state. I worked under instructions directly from Washington at the time. They were given by the commissioner of the General Land Office. I made special examination of land from time to time. That was my general duty. Sometimes I was detailed for some special work, for instance, I was sent to Wyoming. I do not remember the occasion of having had transmitted to me from the General Land Office at Washington certain affidavits in reference to lands in Carbon County, in which S. B. Milner claimed to be interested. I remember of being directed to go down and examine lands that had been sold for the State. I do not remember the year. That was under direct instructions from Washington. I was directed to examine those lands and a number of other tracts of lands. Mr. Roberts accompanied me. He is the engineer here in town. We were on the ground I think two or three days as I recollect. It was not unusual for the Commissioner of the General Land Office to cause to be transmitted to me records of that office, where I was instructed to investigate the tracts in reference to the classification of the land.

"I made memorandum of what I did generally in the field, and when I got back at that time, at the time this examination was made in which I made a memorandum in the field as to what I had observed, I made my report, wrote it out in detail, took a press copy and forwarded it to Washington. Now, some years afterwards they required us to make a detailed record of it in the office, but I did not at that time. I did not keep a detailed record of the report I

made in this instance. It was a number of years afterwards before I did that.

"I made a press copy of what was transmitted to Washington. That press copy I turned over to the United States when I left the service.

"I mean to Capt Hair, who represented the United States."

[fol. 435] "By Mr. Edwards: I call upon the government for that copy. Is it denied upon the same ground that you have given as to the original?"

"By Mr. Maynard: Yes."

"(Witness:) I remember the substance in a general way of that report. I could not give the township in Carbon County where those lands were located that I examined and made report on. I remember the general direction, that it is easterly from Price, and that I stayed all night at a place on top of the mountain, I think it was Soldiers' Summit, and the next day we went off pretty near northerly for a number of miles.

"Mr. Roberts never accompanied me on more than one trip to these lands in Carbon County. A man from Price named James Powell accompanied us on the trip. Those two parties I have named are the only two parties who accompanied me. To determine the exterior boundaries of the property that we went to examine, we had a map with us, and Mr. Roberts, the engineer who run the lines originally under the state selections, and who determined the lines, he pointed out to me those boundaries, and I assumed he was correct. The examination we made was in sections 1 to 15, both inclusive. No others were examined by us. When I left the government service I turned over to Capt. Hair the letter that I received from the commissioner of the General Land Office, instructing me to make this inspection with all other papers belonging to the government in my possession. I have not a copy of that letter. It was in July, 1904. There were three exposures of coal upon the land. They were in section 15. I do not remember what quarter or forty acres it was. I did not see those. There were three forties I didn't see that Mr. Roberts had run lines and told me of them, and I reported that fact, and when I say there were exposures of coal on three forties

in 15, that is merely hearsay. I understood though, that Mr. Milner had relinquished those three forties.

"In a general way I remember the substance of that report that I made."

"Department of the Interior, General Land Office, Salt Lake City, Utah

July 29, 1904.

'Honorable Commissioner G. L. O., Washington, D. C.

'Sir: Referring to office letters 'N,' E. C. F., September 25, 1903, and October 21, 1903, 172,633 in re-examination of [fol. 436] lands in township 13 south of range 11 east, Utah Agricultural College List No. 71 and University List No. 44, I have the honor to report that I have made the examination, as contemplated in your instructions, of section 1, lot 4 of section 3, all of sections 4, 5, and 6, N. W. ¼ of S. W. ¼ of section 8, N. ½ of N. E. ¼ section 8, N. ½ N. W. ¼ section 8, S. W. ¼ of N. W. ¼, section 8, S. E. ¼ of N. E. ¼ of section 8, S. W. ¼ of N. W. ¼ section 9, N. ½ of N. W. ¼ of section 9, N. W. ¼ of N. E. ¼ of section 9, E. ½ of S. E. ¼ and E. ½ of N. E. ¼ section 10, all of section 11 and section 12, and the W. ½ of section 13, N. ½ of N. E. ¼ section 13, N. ½ of section 14, N. E. ¼ of section 15, township 13 south of range 11 east.

'I identified the land in question by the employment of James Powell, a coal prospector, of Price, Utah, as guide, and by the services of F. T. Roberts of Salt Lake City, as surveyor, familiar with the corners, and thus brought the instances within your authorization. There is an opening on the N. ½ of the N. E. ¼ of section 13 that shows unmistakable evidence of coal, and a vein of coal can be traced undoubtedly into the N. W. ¼ of N. E. ¼ of section 15. There is no other place or places where coal is visible on any part of said State selection that I could find. The red lines which includes Plat 'A' show the course of the survey of the State selection in township 13 south of range 11 east that are included in Agricultural College List No. 71, and University List No. 44. They were so run that no coal crops or openings are included except as stated in the N. ½ of N. E. ¼ of section 13, N. W. ¼ of N. E. ¼ of section 15.

The enclosed sectional sketch of Coal Creek Canyon shows the only coal crop, excepting as stated. The elevation of this point is 6000 feet; the coal dips thence to the northeast 11 feet to the 100 feet (111%); at this point I find the Bean Coal Mine, a vein 12 feet thick underlaid with white sandstone overlaid by slate. The white sandstone is there always overlaid with coal, it being the floor, while the roof is always slate, but there are strata of slate that are not the roof of coal, because at places the necessary sandstone accompaniment of the coal measures are absent. The Bean mine is on section 10, has a tunnel about 100 feet long, all in coal of fine quality 12 feet thick, and an opening 30 feet north of the tunnel (which is about 15 feet above the level of the creek which runs from the north) and opposite the croppings shown on the west side of the canyon in Sketch B, which are visible for a distance of about 100 feet on their strike. The survey List No. 71 crosses this canyon about a half mile north of Bean's mine, which is not being worked, and there are none others that are in that canyon or near State selection. The selection [fol. 437] begins at an elevation of 7000 feet about 1000 feet above the croppings of Coal Creek Canyon, and about a half mile back from the bottom of the canyon, and thence declines to the north to a point on its north line 6500 feet high. The land is broken by small secondary canyons that do not reach to the depth of Coal Creek Canyon (and) (when the coal crops) and above the coal if it exists under the said land which as it dips would be from 1000 feet to 1500 feet at the north line, it could at this time after have no commercial value, even in considerable deposits, because of its practically being inaccessible to the market, while coal mines are now being operated on the line of the D. & R. G. Ry. thirty miles west; but if the coal is under said land in quantity it would have a value as a reserve some day when the other mines are 'dug out.' Most of this land is fitted for cattle ranging and very good, but is not used at present for any purpose. While the coal vein probably is under this land or some parts of it, yet I could find no man who would make an affidavit to it as a fact because of the absence of croppings or work to prove it.

'I observed about half a mile north of Bean mine where the State selection crosses Coal Creek Canyon, a great bed

of slate, which may be the roof of the Bean vein or not. Only the boring or mining can determine the fact, and I was not authorized to have the work done by mining to prove or disprove the theory.

Very respectfully, P. S. Sowers, Special Agent G. L. O."

"(Witness:) There is referred to there some other sketches that are with that."

"By Mr. Edwards: I call on the government to produce the other sketches referred to in this letter that are not attached hereto."

"By Mr. Maynard: I do not know anything about them."

"(Witness:) The report refers to one or two other sketches, sectional sketches of Coal Creek, as you read it on the notice, but they would throw some light upon it."

"I didn't examine other lands than those enumerated because I was limiting my work to what I was directed from Washington to examine. I was instructed to examine this specific land enumerated and no others in that neighborhood.

[fol. 438] Whereupon the evidence taken upon cross-examination of Mr. E. D. DUNN in the case of United States v. Truth A. Milner was offered by counsel for the State of Utah and admitted in evidence, and thereupon the direct examination of said witness in said case was offered in evidence on behalf of the United States and the testimony of said witness is as follows:

Direct examination.

By Mr. Maynard:

"My full name is Edward D. Dunn, age 34 years, occupation clerk in the U. S. Land Office, Salt Lake City, Utah. I have been such clerk since December 16, 1902. I had previous experience in the Land Office in Colorado since February 16, 1901.

"I knew Major Hobbs in his lifetime. He was Register during the time I was there and had been prior to the time

of his death several years ago. I recollect the fact of Major Hobbs as Register of the U. S. Land Office at Salt Lake City, sending a communication to the State Board of Land Commissioners informing them a hearsay affidavit attached to the printed list which they had been accepting in the past would no longer be accepted. I have in my possession the original letters copied in our letter book. This is letter book No. 144 of letters written and copied in the United States Land Office, Salt Lake City, Utah, from August 27, 1903, to November 10, 1903. The date of this particular letter is September 30, 1903.

Salt Lake City, Utah, Sept. 30, 1903.

"State Board of Land Commissioners, Salt Lake City, Utah.

"GENTLEMEN: Your attention is respectfully directed to the following found in the decision of the Honorable Secretary of the Interior of July 14, 1903, in the case of the State of Utah v. Century Gold Mining and Milling Company, of which a copy was forwarded to you by my letter of August 12, 1903. I quote from the decision:

" 'It is provided that the entries of non-mineral lands in the mineral states shall be accompanied by non-mineral affidavits based upon the personal knowledge of the entry man. The regulation affidavit is applicable to selections by the State under its grant. As the supporting affidavits filed on behalf of the State are not so made upon personal knowledge of the affiant but solely upon information and [fol. 439] belief the selections in question were erroneously accepted by the local offices.' This decision clearly contemplates that the non-mineral affidavit accompanying selection lists should be made upon the personal knowledge of the affiant and this requirement must be hereafter enforced in this office.

"Very respectfully, Frank C. Hobbs, Register.

"A copy of the decision dated July 14, 1903, signed by Thos. Ryan, Acting Secretary of the Interior in the case of State of Utah v. Century Gold Mining & Milling Company, which was received by the United States Land Office in Salt Lake City, August 10, 1903, accompanying com-

missioner's letter N of August 15, and the letters I received are here. They are now a part of the records of the office and have been since their receipt from Washington. They are offered in evidence by Mr. Maynard and read into the record as part of the complainant's proof as follows, to-wit:

"Copy.

July 14, 1903.

State of Utah v. Century Gold Mining & Milling Co.

The Commissioner of the General Land Office.

Sir: By Sections 12 and 13 of the Utah Enabling Act, proved July 16, 1894, (28 Stat. 107-110) it was provided as follows:

"Section 12. That in lieu of the grant of land for purposes of internal improvement made to new states by the 8th section of the Act of September 4, 1841, which section is hereby repealed as to said state and in lieu of any claim or demand by the State of Utah, under the Act of September 28, 1850, and section 2479 Revised Statutes, making a grant, it is hereby declared is not extended to said State of Utah, the following grants of land are hereby made to said State for the purposes indicated, viz:

"For the establishment of permanent water reservoirs for irrigating purposes, 500,000 acres; for the establishment and maintenance of an insane asylum, 100,000 acres; for the establishment and maintenance of a School of Mines in connection with the University, 100,000 acres; for the establishment and maintenance of a deaf and dumb asylum, 100,000 acres; for the establishment and maintenance of a reform school, 100,000 acres; for the establishment and [fol. 440] maintenance of State normal schools, 100,000 acres; for the establishment and maintenance of an institution for the blind, 100,000 acres; for a miners' hospital for disabled miners, 50,000 acres.

"The United States Penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the State of Utah.

"That said State of Utah shall not be entitled to any further or other grant of land for any purpose than is expressly provided in this Act; and the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned in such manner as the legislature of the State may provide.

"Section 13. That all lands granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior for the unappropriated public lands of the United States within the limits of said State of Utah.

"December 6, 1900, the State of Utah, pursuant to the provisions above quoted, filed in the local Land Office at Salt Lake City, selection, (List No. 115) of certain lands for reservoir purposes which included the S. E. ¼ and the S. ½ of the N. E. ¼ of Sec. 13, Tp. 13, N. R. 15 W.; and February 20, 1901, the State filed further selection, (List No. 122) which included the N. ½ of the N. E. ¼ and the W. ½ of the same section. Publication and posting of notice of the selections were had in accordance with the provisions of Rule No. 102 of the present Mining Regulations. (31 L. D., 474-491): Rule 104 of the Regulations of December 15, 1897, (25 L. D., 563-593). With each selection list was filed an affidavit made by the 'Authorized agents of the State Board of Land Commissioners of the State of Utah' in which it is alleged in part as follows:

"That we have caused the lands mentioned to be carefully examined by agents and employees of the State as to their mineral or agricultural character; that there is not, to our knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin or copper or any deposit of coal; that there is not within the limits of said land to our knowledge any placer, cement, gravel or any other valuable mineral deposit; that no portion of said land is claimed for mining purposes under local customs or rules of miners or otherwise; that no portion of said land is worked for mineral [fol. 441] during any part of the year by any person or persons; that said land is essentially non-mineral land and that our application therefor is not made for the purpose of fraudulently obtaining title to mineral land but with the

object of securing said land for agricultural purposes and the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof.

"December 2, 1901, the Century Gold Mining & Milling Co. filed in the same local land office application for patent to the 'Century Lode Mining Claim, Consolidated,' comprising ten lode claims surveys Nos. 4484 and 4497. Notice of the application was published and posted for the Statutory period and no adverse claim was filed. August 7, 1902, the company applied to make entry for the claims accompanied by tender of the purchase price. The application was thereupon transmitted by the local officers to your office with the statement that the application had been erroneously allowed because of its conflict with the State selection list No. 122 which was not discovered until entry was attempted to be made.

"In your office decision of October 23, 1902, it was stated that the record discloses that all the lode claims in question were located prior to the dates when the State selections were filed and the local officers were directed to advise the State that it would be allowed sixty days within which to show cause why its said selection should not be cancelled to the extent of the conflicts, in default of which, or in the absence of appeal, it was stated such cancellation would be made.

"The State has appealed to the Department. It is urged on its behalf in the appeal that the Honorable Commissioner in the Land Office erred in placing the burden of proof upon the appellant instead of upon the mineral claimants for the reason that said lands in question were advertised by the appellant according to law and the rules of the Department and notice given therein to all persons of the time within which protests might be made against said selection and the mineral claimants were bound to take notice of said advertisement and protect their rights at that time. Said selections having been made according to law without protest within the time required, the presumption is that said lands are non-mineral in character and the burden of proof is on the mineral claimants; and the Honorable Commissioner erred in not citing the mineral claimants to show [fol. 442] cause why their entry should not be cancelled to

the extent of the alleged conflict between the selections of this appellant and their alleged claims.

"By the official plat which accompanies the Century Company's application for patent, the conflicts are shown to extend to and effect both selections presented by the State and to embrace a considerable area. The sole issue thus presented is as to the duty of the State to now establish the availability of the lands in question under the selections attempted to be made by it as held and required by your office.

"By paragraph 24 (and the form therein prescribed) of the general rules applicable to different classes of entries, (circular July 11, 1899, pp 83-87) it is provided that entries of non-mineral lands in the mineral states shall be accompanied by non-mineral affidavits based upon the personal knowledge of the entryman. Mineral lands are not available in the State of Utah under its grant. This is distinctly recognized by the State in these attempted selections. The regulation aforesaid is applicable to selections by it under said grant.

"As the supporting affidavits filed on behalf of the State are not so made upon personal knowledge of the affiants but solely upon information and belief, the selections in question were erroneously accepted by the local officers. Having permitted them to be filed, however, the acceptance thereof of the mineral claimants application for patent without first investigating and determining the character of the lands involved was equally erroneous. There are now pending therefore two antagonistic applications for the land in controversy, the right of either of which to prevail depends upon the character of the land, whether mineral or non-mineral. Whilst for the reasons above given, the showing made on behalf of the State is insufficient to support these (selection-), such showing affords ample justification for an inquiry respecting the actual character of the lands which the Department may always (made) in such cases. Knight v. U. S. Land Assn. (142 U. S., 161-181).

"The record is therefore returned to your office with direction that hearing be ordered upon due notice to the parties at which full opportunity will be afforded them to submit such evidence as they may desire regarding the character of lands in question, whether mineral or non-

mineral. As the selections presented by the State were im-
[fol. 443] perfect when filed and have not been approved by the Department, the inquiry will extend to the date of hearing and the burden of proof will be assumed by the State. Your office will thereafter determine respective rights of the parties in accordance with the showing there made. The decision of your office is modified accordingly.

"Very respectfully, (Signed) Thos. Ryan, Acting Secretary."

"Department of the Interior, General Land Office, Washington, D. C.

August 5, 1903.

State of Utah v. Century Gold Mining & Milling Co.

Lists Nos. 115 and 122, for Reservoir Purposes

Register and Receiver, Salt Lake City, Utah.

Sirs: In reference to the above entitled case, I enclose herewith copies of Departmental decision of July 14, 1903. In accordance with directions therein contained, you will order a hearing upon due notice to the parties to determine the character of the lands, whether mineral or non-mineral, the inquiry to extend to the date of the hearing and the burden of proof to be assumed by the State.

"Very respectfully, W. A. Richards, Commissioner."

"Endorsed on back as follows: '13211 Con. 1402 N Aug. 5, 1903.'"

In State v. C. G. M. & M. Co., involving lists 115 122, reserved.

Enclosed copy of Departmental decision of July 14, 1903, and orders a hearing.

Notes R. & L.

"August 12, 1903, notice of hearing mailed to State Board of Land Commissioners, set a hearing for October 28, 1903, at 10 a. m. Copy of N August 5, 1903, and Secretary's decision of July 14, 1903, registered mail 60 days. W. M. Broadley was also notified by registered mail sixty days, enclosing copy of notice to State and 'N' August 5, 1903.

[fol. 444] "Oct. 2, 1903, to G. L. O. asking return of papers in M. O. 3393.

"Oct. 24, 1903, dismissed under Rule 45 and State notified.

"Dec. 10, 1903, evidence of service of notice and report. Trans. G. L. O. N. Oct. 23, 1903.

Received Aug. 10, 1903.

"Witness: This was simply a letter written to the State Board calling their attention to what evidence they would have to file with the lists that were subsequently filed and within a short time after this list was presented by the State Land Board with the same evidence as heretofore and was rejected. That was list No. 192. The State appealed from the Register's and Receiver's decision.

EXHIBIT No. 23

"Department of the Interior, General Land Office

"'G.' J. R. C.

37967-1908

R. C. M.

Washington, D. C., March 4, 1908.

"I hereby certify that the annexed transcript of appeal filed by the State of Utah in the case of Reservoir List No. 192, from the suspension of said list by the local officers pending the filing of satisfactory non-mineral affidavits is a true and literal exemplification of said affidavit of appeal now on file in this office.

"In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

"Recorder of the General Land Office." 02 "Recorder of the General Land Office." (Seal.)

"To the Hon. Commissioner of the General Land Office, Washington, D. C.

"In the United States Land Office, Salt Yake City, Utah

"Heber M. Wells and Byron Groo, being first duly sworn, say, as to the former, that he is Governor of the State of Utah and ex-officio President of the State Board of Land

Commissioners of said State, and as to the latter, that he is a member and secretary of said Board, and that they are selecting agents of said State, duly authorized to act for the State of Utah in the selection of lands in satisfaction [fol. 445] of the several grants under the act of Congress approved July 16, 1894, (28 Stat. 107-110), the Enabling Act;

"That by virtue of their said official position, and in conformity with law and the rules and regulations of the General Land Office and of the Local Land Office, as prescribed by the Honorable Secretary of the Interior, and the Honorable Commissioner of the General Land Office, these affiants presented to the Register and Receiver of the United States Land Office for the Salt Lake City District, on September 30, 1903, List No. 192 of lands selected by us in part satisfaction of the grant for the establishment of permanent water reservoirs for irrigating purposes as provided in Section 12 of said act of Congress, and asked that said list be filed and the lands therein designated be segregated from the public domain and awarded to the State of Utah for the purpose of said grant, the tracts being 'unappropriated public lands of the United States within the limits of the State of Utah', and subject to selection by us as selecting agents for the State:

"That on October 2, 1903, the State Board of Land Commissioners was duly served by registered mail, with a notice signed by the Register of the United States Land Office at Salt Lake City, Utah, reading as follows:

"In the matter of List No. 192, for the establishment of permanent water reservoir for irrigating purposes, filed September 30, 1903, you are advised that the same has been this day suspended for the reason that the non-mineral affidavit therewith is based upon information and belief of the affiants and not upon their personal knowledge.

"You were advised by my letter of the 30th ult. that there after a non-mineral affidavit, based upon the personal knowledge of the affiants, would be required in all State selections, as per the Hon. Secretary's decision of July 14, 1903.

"The State is hereby allowed thirty days from the receipt hereof within which to furnish the required non-mineral affidavit.

"Affiants allege that since the approval of the said Enabling Act the admission of Utah into the Union as a State, the State Board of Land Commissioners, through its selecting agents, has selected many thousands of acres of land in satisfaction of the several grants to the said State, and these selections have been regularly certified by the Hon-
[fol. 446] orable Commissioner of the General Land Office, and duly approved by the Honorable Secretary of the Interior, the approved lists being duly certified to the Governor of the State of Utah and to the local land office, the title to the lands therein described passing to the State of Utah:

"That in the case of every such selection the non-mineral affidavit has been made by the selecting agents of the State on 'information and belief', and no objection to such affidavits has heretofore been raised by the officers of the local land office nor has the Honorable Commissioner of the General Land Office now or heretofore advanced objection to such affidavits:

"Affiants allege that the action of the Register is arbitrary, unreasonable, uncalled for, and if it shall be sustained and the requirement made that the necessary non-mineral affidavits, to be filed with the State's selection lists, shall be based upon the personal knowledge of the selecting agents of the State, it will be equivalent to a denial and nullification of the land grants to the State of Utah by the said act of Congress. We believe the Honorable Commissioner will readily understand that it will be next to impossible for the State to comply with the requirement as intended by the local land office. The proposition is so preposterous and absurd that it would be designated as ridiculous if it were not for the very serious consequences which would follow its adoption and enforcement. The mere statement of the fact that the State of Utah embraces an area of about eighty-seven thousands square miles should be a convincing argument in favor of the rejection of the Register's position. The lands to be selected by the State in satisfaction of its several grants must necessarily be taken, and are so taken, in small tracts, from every county in the State, extending in a north and south line over 340 miles and easterly and westerly more than 260

miles. To require that the State's selecting agents shall personally visit and examine each tract chosen, with the view to the ascertainment of its mineral or non-mineral character, would be to compel the State to delay the filing of its grants for decades, or to employ an army of agents, all under the commission of the State, and at a cost widely out of proportion with the value of the land; and in the latter case, each selection list would necessarily be confined to one or two tracts of limited area, embracing only the land that each of such army of agents might be able [fol. 447] to examine. It is astonishing that such a requirement should be contemplated.

"These affiants allege that in the case of every selection made by the State, we first obtain non-mineral affidavits, based upon the personal knowledge of persons familiar with the land, and where such affidavits are not furnished, no attempt is made to select the tracts, as it has not been the desire, purpose or intent of the State Board of Land Commissioners to obtain title for the State to mineral land, and no effort has been made in that direction. Based upon the affidavits of those familiar with the land, that they have personally examined the several tracts and that the land is non-mineral, the regulation blank provided by the General Land Office being used, affiants make the affidavit on 'information and belief,' which accompanies each selection list.

"The law is not unreasonable, and does not contemplate vain and impossible things, and affiants cannot believe it is the intention or desire of the Department to nullify the operation of the Statute by prescribing rules and regulations which cannot be complied with.

"Affiants respectfully ask that the suspension of its selection list No. 192 for the establishment of permanent water reservoir for irrigating purposes, be revoked by the Honorable Commissioner of the General Land Office and that the officers of the local land office be instructed to accept and file the said list for approval.

Heber M. Wells, Governor and Selecting Agent for the State of Utah. Byron Groo, Secretary of the State Board of Land Commissioners, and Selecting Agent for the State of Utah.

"STATE OF UTAH,
County of Salt Lake, ss:

"Personally appeared before me, a Notary Public in and for Salt Lake County, State of Utah, this 12th day of October, 1903, Heber M. Wells, Governor of the State of Utah, and Selecting Agent for the State of Utah; also Byron Groo, a member and Secretary of the State Board of Land Commissioners, and Selecting Agent for the State of Utah, who each acknowledge that he had read the foregoing affidavit, and in my presence he signed his name thereto; affiants are to me personally known, and I verily believe [fol. 448] them to be credible persons and the persons they represent themselves to be.

Elbridge L. Thomas, Notary Public. (Notarial Seal.)

"Endorsed 'Ex. O.' J. W. C.' "

'Witness: After this appeal was made a decision was rendered by the officers at Washington on the appeal."

'Department of the Interior, General Land Office,
Washington, D. C.

Oct. 30, 1903.

'Register and Receiver, Salt Lake City, Utah

'SIRS: With your letter of October 14, 1903, you transmitted the appeal of the State of Utah from your action of October 1, 1903, in suspending list No. 192 of selections for Reservoir and requiring non-mineral affidavit made upon the personal knowledge of the affiant.

'The list in question is on the usual form used by the State Board of Land Commissioners and contains a non-mineral affidavit executed by the Governor of the State and the Secretary of the State Board of Land Commissioners as the agents for said Board to the effect that they have caused the described lands to be examined by the agents and employees of the State as to their agricultural character and that there is not to their, (the affiants) knowledge any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, etc.

'Your action was based upon Departmental decision of July 14, 1903, unpublished in the case of State of Utah v. Century Gold Mining & Milling Co., wherein it was held

that paragraph 24 of the General Rules applicable to different classes of entries (page 87 of circular July 11-1899) was applicable to selections by states and that the non-mineral affidavit required in all classes of entries must be based on the personal knowledge of the entry man.

'The State Board of Land Commissioners acting through its president and secretary excepts to our action and, notwithstanding you cited in full the Departmental ruling of July 14, 1903, supra it denominates your action as 'arbitrary, unreasonable and uncalled for' and states: that the proposition is so preposterous and absurd that it would [fol. 449] be designated as ridiculous if it were not for the very serious consequences which would follow its adoption and enforcement.

'Section 13 of the Act of July 16, 1894 (28 Stats. 107-110) provides:

'That all land granted in quantity or as indemnity by this Act shall be selected under the directions of the Secretary of the Interior from the unappropriated public lands of the United States within the limits of said State of Utah.

'Mineral lands are not subject to the grant, (27 L. D., 53) and the regulation of May 27, 1891, (24 L. D., 548) by the last paragraph made applicable to all states and territories, reguires: (Paragraph 3)

'In all cases the selected tracts must be covered by non-mineral affidavits made by the duly appointed selecting agent or by an agent appointed by the selecting agent for the purpose, and if by the latter, evidence of his appointment should accompany the affidavit.

'I do not find that any special regulations have been formulated governing the selections by the State of Utah under Act of July 16, 1894, as there was under the Act of June 28, 1898, in which the case of New Mexico (see 27 L. D., 28). In the latter case it was specifically held (paragraph 3) 'a non-mineral affidavit can be sworn to only on personal knowledge and cannot be made on information and belief.' The decision cited of July 14, 1903, also holds that it is an error to allow a selection for lands covered by a non-mineral affidavit without a personal knowledge of the affiant and you could have allowed the selections in question only by ignoring the unequivocal declaration of the Department.

'The requirement of the Department is not unreasonable. Proof of the character of the land is essential and it is for

this office to determine as to the sufficiency of the proof and not the State's selecting agent.

'If the affidavit of the selecting agent is correct, that they have caused the lands to be examined by the agents and employees of the State, it is only necessary for the State to furnish affidavits of its agents or employees with evidence of their appointment. The office fails to see wherein the enforcement of the regulation imposes any great burden on the State in the matter of the examination of the [fol. 450] land; it only prefers the affidavits of those who know rather than those who believe.

'Your action is affirmed and you will so advise the State of its right of further appeal.

'Very respectfully, J. H. Fimple, Acting Commissioner.'

"Witness: Since the decision sustained the register and disallowed the appeal, the practice since has been to require that the State furnish with each list non-mineral affidavits made upon the personal knowledge of the affiant, and that is filed with the lists at the time the lists themselves are filed. Prior to this ruling and prior to the decision of the Register and confirmation by the Commissioner, the only evidence before the Register and Receiver as to the mineral and non-mineral character of the land ordinarily was that which appeared upon the printed list—that is, in the first instance. That was the affidavit which was made by the President and Secretary of the State Land Board.

"I know from my own knowledge the meaning of the endorsements appearing on the body of lists marked 'Exhibits 3, 4, 5, 6 and 7.' The lists were first examined to see whether or not the land was vacant and then they were also examined as to whether or not they were within a mineral township, a mineral township meaning a township which had some mineral claims of record in the Land Office and also as to whether or not the land was returned there as mineral or as coal. If the land was found to be within a township containing a mineral claim of record, a notice for publication issued. If it was not found to be within a township containing a mineral claim of record or in which coal was returned or mineral returned, no publication of notice or notice issued. The case where it was found that the land

was returned as mineral or as coal, a notice for publication issued and also a citation, citing the State and all parties who had any objection to appear on a certain date and to submit evidence as to the mineral or non-mineral character of the land, and that when these notices had been issued or if it was not necessary to send out any notices, then the Register and Receiver approved the lists and they were transmitted by special letter to the Commissioner of the [fol. 451] General Land Office. There are numerous evidences in the lists mentioned as to the publication of notice that I have referred to but unless I know the particular tracts of land in controversy in this case I cannot say as to them. There are no notices attached to the list but there are notices as to the issues of such notices. There would be a difference between a notice issued where the land was simply within a township which had a mineral claim of record or one in which the land was returned as mineral or coal. There were just two classes of cases and they would have two different forms of advertising notice.

"This notice is (marked) 'Exhibit 24' and is in form as follows:

'EXHIBIT No. 24

Non-mineral Affidavit

'This affidavit can be sworn to only on personal knowledge, and cannot be made on information and belief.

'The Non-Mineral Affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required by the entryman.

'Department of the Interior, United States Land office

—— —, 190—.

'—— ——, being duly sworn according to law, deposes and says that he is the identical —— who is an applicant for Government title to the ——; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly

with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land [fol. 452] is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons, that said land is essentially non-mineral land, and that his application therefore is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes; that the said land is not occupied and improved by any Indian, and that his post-office address is ——.

——.

'I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me ——), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in ——, within the —— land district, on this — day of ——, 190-.

——.

'Note.—The Officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

'Revised Statutes of the United States, Title LXX.—Crimes, — Chap. 4

'Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or

certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

[fol. 453] "Exhibit 25 was offered in evidence as part of proof of complainants and is in form as follows:

EXHIBIT No. 25

Notice

United States Land Office, Salt Lake City, Utah

'To whom it may concern:

'The State of Utah having selected as a part of its grant for the —— under the (—th) section of the Act of Congress approved July 16, 1894, the following described tracts, returned by the United States Surveyor-General as mineral land, notice is hereby given that the said State will submit proof as to the character of said land, before the Register and Receiver, at this office, on Monday, the — day of ——, at 10 o'clock a. m., viz:

'All persons claiming any portion of said described tracts as mineral land, or desiring to protest or object to the selection thereof by the State, are hereby summoned to appear on that date, and submit testimony in support of their claims or objections.

—— ——, Register. —— ——, Receiver.'

EXHIBIT 26

was offered in evidence as part of proof of complainants and is in form as follows:

Notice

United States Land Office, Salt Lake City, Utah

'To whom it may concern:

'Notice is hereby given that the State of Utah has filed in this office a list No. — of lands selected by the said State,

for the —— under section — of the Act of Congress, approved July 16, 1894. The following tracts, embraced in said list, are in a township containing mineral claims of record, viz:

'A copy of said list, so far as it relates to said tracts, by descriptive subdivisions, has been conspicuously posted in this office for inspection by any person interested, and by the public generally.

'Within the next sixty days following the date of this notice, under departmental instructions of November 27, [fol. 454] 1896, (23 L. D., 459), protests or contests against the claim of the State to any of the tracts or subdivisions hereinbefore described, on the ground that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C. Failure so to protest or contest, within the time specified, will be considered sufficient evidence of non-mineral character of the tracts, and the selection thereof, being otherwise free from objection, will be recommended for approval.'

—— ——, Register. —— ——, Receiver.

"Witness: The practice at that time was for the publication to be ordered and while the publications were running the required length of time, the lists as received from the local land office were forwarded by the Officers of the United States Local Land Office to Washington. Non-mineral affidavits which were termed affirmative proof would only be submitted where the land had been returned as mineral or as coal. In other cases no further non-mineral showing would be made other than that which was found in the list itself. The State would only furnish additional supplemental proof where the land was returned as mineral or coal. Where it was simply within a township containing mineral claims of record the State would furnish no further non-mineral proof. In the cases where the additional proof was required the proof would be in the shape of ex parte non-mineral affidavits that would be filed in our office. They would be submitted from the State Board of Land Commissioners and who the affiants were or what connection they had with the lands, or with the application for the lands, we would not know, and such non-mineral affidavits as were received would be transmitted by due course of mail by us

to the General Land Office. That would not be all of the proof that would be furnished to the Commissioner of General Land Office upon which he would adjudicate and pass upon the mineral or non-mineral character of the land because of the fact a notice would also be published for a certain period which would enable people to make objection as to mineral or non-mineral character of the land. Of course, that was before the approval and certification of the list. Nothing further in the shape of testimony would be produced except in cases where a protest had been instituted by some person or persons.

"I see no evidence of a hearing having been ordered upon the list No. 32 School of Mines and the selection so far as [fol. 455] they relate to the matters in controversy in this litigation, is the N. E. ¼ and the S. E. ¼ of Sec. 22 and the E. ½ of Sec. 27 and the E. ½ of Sec. 33 and all of Sec. 34 and the S. ½ of Sec. 35, Township 12 S. of Range 11 E., containing 1920 acres. On this list there is no notation that these lands were mineral or returned as coal so that, so far as these 1920 acres are concerned, and so far as appears from the original list, no evidence whatever was returned to the Commissioner of the General Land Office other than non-mineral affidavit attached to the list. Such would appear from the list.

"I do not find on the list any notation whatever denoting publication of any such notice as to agricultural list No. 67 being plaintiff's Exhibit 4 for 320 acres. So that there was no evidence submitted to the commissioner of General Land Office other than the non-mineral affidavit of the Governor of the State and Secretary of the Land Board.

"Calling attention to College List No. 71 being Exhibit 5, an application made by Truth A. Milner before the State Land Board requesting it to select the north half of Section 33, Township 12 south of Range 11 east and lots 1, 2, 3 and the Southeast quarter of the Southeast quarter of Section 3, Township 13 south of Range 11 east, containing 477.04 acres. Opposite that description there is a notation that some of the same had been returned as coal and mineral, not as to all of that description that was given. As to the north half of Section 32, Township 12 south of Range 11 East, there is not any notation at all. So far as that description is concerned it stands the same as the preceding

description. I don't want to be understood as saying in any description before that that no publication was had. In the first selection (list 32) there had been a publication. If it is all in Township 12 south of Range 11 east, there was no publication, and in the second case, it was Township 12, south of Range 11 east, and there was no publication in that case, so as a matter of fact then with regard to this 477.04 acres there was no publication as to the first description, viz., the south half of Section 32, Township 11, north of Range 11 east. The only evidence before the Commissioner so far as this land is concerned, is the hearsay affidavit of the selecting officials of the State Land Board. Now then, we come to the first description of the land that my attention is called to in which the land seems to have been returned as coal and mineral naming lots 1, 2 and 3 and the Southeast quarter of the Southeast quarter of Section 3, Township 13 south of Range 11 east. I find opposite lots 1, 2 and 3 and the Southeast of the Southeast quarter [fol. 456] of Section 3, Township 13 south of Range 11 east, there is a notation 'Mineral.'

"In pursuance of our custom, a publication was made, the notice in this case being issued to the Eastern Utah Advocate at Price. In this particular case, the notice marked Exhibit 26 would be used. I could not state whether there was any additional affidavit presented to our office because this is on the record of the Local Land Office. We might have had a number and yet it might not be shown on this. The records of our office in Salt Lake City would disclose if there had been any such filing. On the ordinary cases, it would show the fact of the proof of publication was transmitted on a certain day, and would show that additional affidavit had been filed, if such was filed. If these affidavits were filed, the names of the affidavits would not be given. It would be simply the fact that the additional affidavits were filed, and then the affidavits regularly in the course of business would be transmitted by the Local Land Office to Washington and I could not state positively without the records themselves whether we would have any evidence or not on record as to who the persons were that made this affirmative proof. The notation 'mineral' is made on Exhibit 6, being the application of Harly O. Milner for the purchase from the State of Utah, agricultural list No. 75, from the United States under its grant, provided for in the En-

abling Act of 2244.24 acres described as all of Sections 1 and 3, and N.½ of Sec. 10, N. ½ of Sec. 11 and the N. ½ of Sec. 12, in Township 13, S. of Range 10 E. Notice of publication on this was issued to the Eastern Utah Advocate, Price, and delivered to the State Board of Land Commissioners personally. The form of publication in this case is contained in Exhibit 26. There is a notation 'coal returned' on the list marked 'Exhibit 3' being State selection list, Deaf and Dumb list No. 52 for the lands described in that list, or it would appear from this list that the S. E. ½, Sec. 12, Township 13, S. of Range 10 E. has the notation 'coal returned' but nothing as to the other tracts. This list would only seem to vindicate that the S. E. ¼ of Sec. 12 was returned as coal. So far as the rest of that is concerned, those would indicate that the State had furnished affirmative proof as to all of these tracts and that it was adjudged non-mineral by the Land Commissioners Office. The notation opposite these tracts is 'Adjudged non-mineral by "N" to R. R. Nov. 7, 1904, C. A. H.' so I would take it from that notation that the State had furnished affirmative proof, as to all of these lands, of which you read here. I am not sure that there would be non-mineral supporting affidavits from [fol. 457] the State furnished as to all the lands. Those affidavits would be in the General Land Office.

"List No. 32, Exhibit 7, School of Mines, received and filed on December 18, 1900 and approved by the Register and Receiver on December 24, 1900. The list has no notation relative to the publication of any notice as to tracts in 12 S. Range 11 E. and involved in this suit. I have also approved List No. 5 of selections for School of Mines, approved by the Secretary of the Interior on June 22, 1901 and embracing with other lands the tracts selected in List No. 32, Exhibit 7. This copy of approved list was received under authority of Commissioner's letter 'G' of July 5, 1901. Following is copy of the letter:

"'Washington, D. C., July 5, 1901.

"'Register and Receiver, Salt Lake City, Utah.

"'GENTLEMEN: I transmit herewith a copy of approved list No. 5 of lands selected by the State of Utah for the establishment and maintenance of School of Mines, made in Salt Lake City Land District, aggregating 11166.59 acres, approved by the Secretary of the Interior on June 22, 1901.

"'You will note approval on records, referring to this letter as your authority for so doing and duly acknowledge receipt hereof.

"'Very respectfully, Binger Herman, Commissioner.'"

"That is all we have from the record of the office relative to this list. No further evidence was transmitted other than the lists themselves when they were approved by the Local Land Office here to Washington.

"There is no notation showing the publication of any tracts in list 67, Exhibit 4, Agricultural College, received and filed April 23, 1901, and approved by Register and Receiver on April 29, 1901.

"I have also approved list No. 6, Agricultural College, including all of the lands embraced in this list, approved by the Secretary of the Interior on December 23, 1901. This was received with Commissioner's letter 'G'; the letter reads as follows:

[fol. 458] "'Washington, D. C., Jan. 21, 1902.

"'Register and Receiver, Salt Lake City, Utah.

"'Sirs: I transmit herewith a transcript of approved list No. 6 made by the State of Utah for Agricultural College purposes, embracing 17181.76 acres.

"'Note the approval on your records and acknowledge receipt of the list.

"'Very respectfully, Binger Herman, Commissioner.'"

"So far as our records show, there was no evidence other than the list that was submitted to the Commissioner as to these lands described in the above list.

"I have here a list No. 71, Exhibit 5, Agricultural College, received and filed April 3, 1902, and approved by the Register and Receiver April 7, 1902, as to the N. ½ of 33 12 S. 11 E. The list has no notation as to the publication of that tract whatsoever. As to lots 1, 2 and 3, in the S. E. ¼ of S. E. ¼ Sec. 3, Tp. 13 S., Range 11 E. opposite those tracts appears notation 'Mineral' and that notice for publication issued to the Eastern Utah Advocate of Price, Utah, and delivered to the State Board of Land Commissioners personally April 7, 1902, and that on August 13, 1902, proofs were transmitted to the General Land Office. I have here a copy of the Register's letter of August 13, 1902, transmit-

ting the proofs. It is found on page 131 of book 138 of letters kept in the United States Land Office, Salt Lake City, and it is as follows, to-wit:

'Salt Lake City, Utah, August 13, 1902.

'Honorable Commissioner of General Land Office, Washington, D. C.

'SIR: I have the honor to transmit herewith proofs of publication and posting in this office and of payment of publishers fees for notice for publication involving lands lying within the mineral township selected by the State of Utah under the Act of July 16, 1894, for Agricultural College purposes in list No. 71. Said list was transmitted to your office on April 7, 1902, with marginal notations denoting the tracts advertised.

'A hearing was called at this office for June 17, 1902, to determine the character of these tracts embraced in said [fol. 459] list returned by the Surveyor General as coal land in Township 13, S. Range 11 E. and notice was properly served on the State as to such hearing. Affirmative proof as to the non-mineral character of all the tracts in question was furnished by the State except as to the E. ½ S. E. ¼ N. E. ¼ Sec. 9, S. ½ S. W. ¼ Sec. 11, S. E. S. W. ¼ and S. W. ¼ Sec. 12, and no reason has been assigned for omitting these tracts,

'The non-mineral proof furnished, as well as evidence of service on the State is herewith transmitted.

'No contests or protests have been filed in this office against any of the tracts in question. It has, however, been suggested to this office that nearly all of Township 13, S. Range 11 E. contains valuable deposits of coal and is chiefly valuable therefor.

'Very respectfully, Frank D. Hobbs, Register.'

"I have also approved list No. 8, Agricultural College that has reference to the same thing. I am giving all the records appearing in our office in each case. We never received any answer from the Commissioner to the letter that has just been read into the record as to these particular tracts involved in this suit. No notice was taken by him of the suggestion made by the Register. It would appear from

the letter that affirmative proof is only submitted by the State as to those tracts involved in this particular list which were returned as coal land and none of the tracts which are involved in this particular suit were returned as coal land so there was no affirmative proof transmitted as to those particular tracts. There was no omission to furnish required proof. Approved list No. 8, Agricultural College aforesaid, includes the tracts involved in this suit, which was approved by the Secretary of the Interior July 9, 1903, and received with Commissioner's letter 'G' on July 20, 1903, as follows:

'Washington, D. C., July 20, 1903.

'Register and Receiver, Salt Lake City, Utah.

SIRS: I transmit herewith a copy of approved list No. 8 of lands selected by the State of Utah for Agricultural College purposes made in the Salt Lake City Land District, aggregating 5549.56 acres, said list having been approved by the Acting Secretary of the Interior on July 9, 1903.

[fol. 460] 'You will note the approval on your records, referring to this letter as your authority for so doing and acknowledge receipt hereof.

'Very respectfully, J. H. Fimple, Acting Commissioner.'

"So far as the particular lands in this last approved list are concerned, all the evidence that was transmitted by the local Land Office to the Department at Washington as to the character of these lands was the printed affidavit of the State Selecting Officers endorsed on the list and the fact that the Register ordered a publication in the newspaper that you had referred to, and that was all.

"I have here list No. 52, Exhibit 3, received and filed September 17, 1903, approved by the Register and Receiver on September 25, 1903. It would appear from the notations on this list that the land was returned as coal land and that on September 25, 1903, notice for publication issued to the Eastern Utah Advocate of Price and delivered to the State Board of Land Commissioners personally and a hearing was set for December 21, 1903, at 10 a. m. That on February 25, 1904, proofs of publication, etc., and non-mineral affidavits were transmitted to the General Land Office. I have here a copy of the letter of the Register referred to of February 25, 1904. It is found on page 59 of letter book

147 of impression copies of letters from the Register and Receiver at the United States Land Office at Salt Lake City, Utah. It is as follows:

'Salt Lake City, February 25, 1904.

'Hon. Commissioner of General Land Office, Washington, D. C.

'SIR: I have the honor to transmit herewith proofs of publication and of posting in this office and of the payment of publisher's fees and notice of publication involving lands lying within mineral townships selected by the State of Utah for the establishment and maintenance of Deaf and Dumb Asylum in list No. 52. Said list was transmitted to your office on September 25, 1903, with marginal notations as to the tracts advertised. As to those tracts embraced in said list returned by the Surveyor General as mineral land, hearings were called for December 21, 1903, at this offce to determine the character of the land so returned. On the date named the State submitted affirmative proof of the [fol. 461] non-mineral character of the land. Attention is here called to non-mineral proof filed as to those tracts in Township 3 S., Range 4 E., wherein it is changed from the regulation affidavit.

'No contest, protest or suggestions as to the mineral character of any tracts in question have been filed in this office.

Very respectfully, Frank D. Hobbs, Register.

"I have Commissioner's letter N. of November 7, 1904, which is as follows:

'Washington, D. C., N[redacted]7, 1904.

'Register and Receiver, Salt Lake City, Utah.

'SIRS: September 25, 1903, the State of Utah selected in its list No. 52 (Exhibit 3), Deaf and Dumb Asylum with other lands the S. E. ¼ of Sec. 12, E. ½ N. E. ¼ Sec. 14, Township 13 S., Range 10 E. Lot 1, N. E. ¼ N. W. ¼; N. E. ¼, N. ½ S. E. ¼, S. E. ¼ Sec. 7, Township 13 S., Range 11 E. N. W. ¼, S. E. ¼ Sec. 35, Township 39 (?) S., Range 9 W.

'February 25, 1904, you transmitted proof of publication under the mining regulations for the tracts above described, also affirmative proof submitted by the State to overcome the mineral returns from these lands. The proof consists of

a number of affidavits by parties who each allege from personal knowledge the non-mineral character of said lands. The proof is accepted and said tracts are adjudged non-mineral.

'You also submitted proof of publication accompanied with affirmative proof submitted by the State to overcome the mineral return for the N. E. ¼, N. W. ¼ Sec. 20 and lot 4, Sec. 21, Township 3 S., Range 4 E., also selected in said list. The proof consists of an affidavit signed by three witnesses in which they have modified the usual non-mineral affidavit by stating therein that there are no mineral bearing veins of value and that no portion of said land is claimed with mineral of value and that no portion of said land is worked for mineral other than prospecting. In view of the fact that due notice was given by publication and posting for the tracts covered by said modified affidavit and no protests filed, and further that the records of this office do not show any mineral conflicts, the proof may be accepted and said tracts adjudged non-mineral.

Very respectfully, W. A. Richards, Commissioner.'

[fol. 462] "It is the first half of this letter that is relevant to this case. So far as these lands are concerned, it appears certain affidavits were filed in our office and transmitted to Washington. I have no record of who the affiants were. Those affidavits plus the showing made on the list in the shape of the State Selecting Officer's affidavit, together with the proof of publication of notice, was the proof that was transmitted to the commissioner for his action. The letter in which they were transmitted is dated February 25, 1904.

"I have here approved list No. 10, Deaf and Dumb Asylum approved by Secretary of the Interior, December 1, 1904, approving all the lands in this list involved in this suit. That was approved December 1, 1904, and received with Commissioner's letter 'G' of March 24, 1905, which reads as follows:

'Washington, D. C., March 24, 1905.

'Register and Receiver, Salt Lake City, Utah.

'GENTLEMEN: I transmit herewith a copy of approved list No. 10 embracing 8803.77 acres of selection by the State of Utah for the establishment and maintenance of a Deaf and Dumb Asylum.

'Note the approval on your records, referring to this letter as your authority, and duly acknowledge receipt.

Very respectfully, W. A. Richards, Commissioner.

"As to these lands, not only the printed affidavit appearing upon the list, but also the non-mineral affidavit which were transmitted by letter of February 25, 1904, were submitted to the Commissioner.

"List No. 75, Exhibit 6, Agricultural College, was received and filed March 24, 1903, and approved by Register and Receiver on March 30, 1903, and as to the tracts involved in this suit appears the notation 'mineral' and that notice for publication issued March 30, 1903, to the Eastern Utah Advocate of Price, and delivered to the State Board of Land Commissioners personally; that on August 4, 1903, proofs were transmitted to the general land office. The letter referred to is of date of August 4, 1903, and is found on page 281 of letter book No. 143 of the files of copies letters in the United States Land Office, Salt Lake City. It is as follows:

[fol. 463] 'Salt Lake City, Utah.

'Hon. Commissioner of General Land Office, Washington, D. C.

'SIR: I have the honor to transmit herewith proofs of publication and of posting in this office and of payment of publisher's fees for notice to publication of all lands lying within the mineral townships selected by the State of Utah for the use of Agricultural College in List No. 75 (Exhibit 6).

'Said list was transmitted to your office on March 30, 1903, with marginal notations as to the tracts advertised.

'A hearing was called at this office for June 15, 1903, to determine the character of those tracts embraced in said list returned by the Surveyor General as mineral lands. Affirmative proof of the non-mineral character of said lands is transmitted herewith. No contests, protests or suggestions as to the mineral character of any of the tracts in question have been filed in this office.

Very respectfully, Frank D. Hobbs, Register.'

"It would appear from this letter that there was not any other proof except the non-mineral affidavit attached to the list and the proof of publication. That would be a case where affirmative proof under the rules would not be re-

quired. The word 'hearing' used in this letter that has just been read is also used in connection with a formal contest that is ordered by the Commissioner upon the filing of a protest for approval by some third party. In these particular cases it happened that the hearings were ex parte but if anyone had made an objection on the date set in the notice such a hearing would have been had as would have been had if a formal protest had been filed and a hearing ordered by the Commissioner. If no objection was made at the hearing by anyone, all the hearing there was would be just the filing in our office in pursuance of that printed notice, of these supporting, ex parte, non-mineral affidavits. If an objection was made by a third party, then it would occupy a status as any other contest. If anybody desired to contest it they would file a notice to that effect on or before the day set in this notice and if that was done, the Register and Receiver on their own motion might order a hearing then in order that the contestant might be heard either on that day or some subsequent day, and on that subsequent day the Register and Receiver would meet substantially as a local [fol. 464] court to hear the testimony, which would be required to be submitted to them. They would proceed on their own motion without referring the matter to a Commissioner only in cases where objection was made during the publication of notice or on the date set for the hearing. If an objection was made in the form of a protest subsequent to that date it would have to be transmitted to the Commissioner for his action. I do not find anywhere in the record that any testimony is taken in any hearing in the sense of taking of oral testimony before the Register and Receiver, nor do I find that any testimony was ever taken before the Register and Receiver on a protest made subsequent to this date on the order of the Commissioner. The only sense in which the word 'hearing' can be properly and technically used is the hearing in the sense of the general one, that they gave an opportunity for people to meet there and give testimony if they desire and there was no such testimony given.

"I have approved list No. 9, Agricultural College, approved by Secretary of the Interior May 19, 1904, and including among other lands the tracts embraced in this suit received by, and under the authority of Commissioner's letter 'G' of June 20, 1904, which is as follows:

'Washington, D. C., June 20, 1904.

'Register and Receiver, Salt Lake City, Utah.

'SIRS: I transmit herewith a copy of approved List No. 9 selected by the State of Utah for Agricultural College purposes, aggregating 16,187.14 acres. The said list having been approved by the Secretary of the Interior May 9, 1904. You will note the approval on the records of your office referring to this letter as your authority for so doing, and duly acknowledge receipt hereof.

Very respectfully, J. H. Fimple, Acting Commissioner.

"That is all we have of the records of our office relative to List No. 75 and referring to the tracts involved in this suit. There is no evidence of any kind tending to show that there was ever any hearing had in the Local Office involving any of the lands in controversy in this suit, in which oral testimony was taken before the Register and Receiver, as to the question of the character of the land, whether they [fol. 465] were mineral or non-mineral. The records show no transmittal of any testimony."

"(Here Mr. Maynard offers as part of the proof for complainant Exhibit 27, which consists of a number of documents and for the purposes of this record are marked Exhibit 27 to 27-g, and are as hereafter set forth. To each of these separate offers objection was made for the reason that the same were incompetent, irrelevant and immaterial.)

Ex. 27

(4-092) 1738

Coal Lands

"Prior Possession, with Power of Attorney and Non-mineral Affidavit

"I, Pancha K. Gilson, whose post-office address is 905 Park Ave., Salt Lake City, Utah, being a single woman over twenty-one years of age, and a native born citizen of the United States, and never having, either as an individual or as a member of an association, held or purchased any coal lands under the act approved March 3, 1873, entitled, 'An

Act to provide for the sale of the lands of the United States containing coal,' do hereby declare my intention to purchase, under the provisions of said act, the lots 6 and 7 of Section 3, W. 2 N. E. 4 and N. W. 4 S. E. 4, quarter of Section 10, in township 13 S. of range 11 E. S. L. M., of lands subject to sale at the district land office at Salt Lake City, Utah, and that I came into possession of said tract on the 16 day of December, 1900, and have ever since remained in actual possession continuously, and have expended in labor and improvements on said mine the sum of Eight Hundred Dollars, the labor and improvements being as follows: A cabin, a tunnel and several open cuts exposing coal of a merchantable quantity and quality, that I have caused to be located and opened a valuable mine of coal thereon; and I do further swear that my knowledge of said land is not such as to enable me to testify understandingly with regard thereto; that a non-mineral affidavit is attached hereto sworn to by S. H. Gilson, my duly authorized agent.

Pancha K. Gilson.

[fol. 466] "Subscribed and sworn to before me this 31 day of March, 1902. L. H. Gray, Notary Public. (Seal.)

(Endorsed:) "Amended to lot 7 Sec. 3 and W. 2 N, E. 4 and N. W. 4. S. E. 4 Sec. 10 Tp. 13 S. S. R. 11 E. per Comr's letter N. of July 19th, 1902.

"Power of Attorney

"Know all men by these presents, That I, Pancha K. Gilson, having applied as aforesaid to enter the above described lands, hereby authorize and empower S. H. Gilson to complete the necessary proof therein, especially to make the required non-mineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdivision of said described land; hereby ratifying and confirming all acts that my said agent shall lawfully do by virtue hereof.

Pancha K. Gilson. Pancha K. Gilson.

Two witnesses: L. H. Gray, Archibald C. Milner.

"Subscribed and sworn to before me this 31st day of March, 1902. L. H. Gray, Notary Public. (Seal.)

Non-mineral Affidavit

"County of Salt Lake,
State of Utah, ss:

"S. H. Gilson being duly sworn according to law, depose and say that I am the agent for Pancha K. Gilson, applicant for Government title to the above-described land, and that I am well acquainted with the character of said described land, and with each and every subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper; and that there is not to my knowledge, within the limits of said land, any valuable mineral deposit other than [fol. 467] coal; that said land contains large deposits of coal, and is chiefly valuable for coal, so help me God.

"S. H. Gilson.

"Subscribed in my presence and sworn to before me this 31st day of March, 1902. L. H. Gray, Notary Public. (Seal.)

(Endorsed:) 1738. Coal Land. Declaratory Statement of Pancha K. Gilson, 905 Park Ave., Salt Lake City, March 31, 1902. Sec. —, T. —, R. —. Land Office at Salt Lake City. See Letter N, July 19, 1902, and Page 90, Gen. L. O. Cir. Recd. Mar. 31, 1902—9 A. M. L. H. Gray, Atty.

"Exhibit 27a

"State of Utah,
County of Salt Lake, ss:

"Pancha K. Gilson being duly sworn says that she is the same person who made coal filing No. 1738 for lots 6 and 7 of section 3 and W. ½ N. E. ¼ of section 10, Tp. 13 S., R. 11 E., on March 31, 1902, alleging settlement on Dec. 16, 1900.

"That in making said filing she depended upon her attorney in fact, S. H. Gilson, who in turn depended upon a survey made by one A. D. Ferron.

"That by reason of a conflict between James A. Bean and Hulda Sjoberg for land adjoining that covered by the filing of this affiant, the said Bean has discovered an error in the

land filed on by him and has applied for an amendment of his filing and the final proof made by him in support of his said filing which amendment conflicts with the filing of this affiant and she has secured the services of one Talimantes, a Deputy Surveyor, to trace the lines of her land and thus finds an error in the description similar to the error made by the said Bean and she also finds it necessary to amend [fol. 468] her own filing in order to clear the same of conflict with the said Bean.

"That the amendment of her own filing to conform to the survey will leave her said filing free from conflict with the said filing of Bean.

"Affiant states further that the error on her part and that of Bean was discovered since said filings were made and did not in any way result from a lack of examination of the land by her Attorney in fact prior to the making of the filing.

"That this amendment is desired for the purpose of securing the land upon which her coal openings are situated, as she is advised by her said Attorney in fact, there being coal exposed or a deposit of coal upon each of the 40 acre tracts.

"She therefore asks that she be permitted to amend her filing to include lot 7 of section 3, W. ½ of the N. E. ¼ and N. W. ¼ of the S. E. ¼ of Sec. 10, Tp. 13 S. R. 11 E. S. L. M., the tract she supposed she was filing upon, the same being the tract which her improvements are upon as described in her coal filing.

"This amendment is desired for the further purpose of freeing this affiant from conflict with the said Bean and enable her to secure her improvements without expense of litigation with said Bean.

"She states further that she has not sold, assigned or relinquished her said erroneous filing, nor has she agreed to do so, but that her said filing and this application to amend are made in entire good faith for the sole purpose of securing the land to which she is entitled under her said filing.

"That the land to which she desires to amend is of the character contemplated to be entered under the coal land laws, as shown by the affidavit of her Attorney in fact.

Pancha K. Gilson.

"Subscribed and sworn to before me this 24" day of May, 1902, in my office at Salt Lake City, Utah, and I further certify that affiant is a person of creditability to whose statements full credit should be given. Frank D. Dobbs, Register.

"Also appeared before me at the same time and place the undersigned who being by me duly sworn depose and [fol. 469] say that they have read the foregoing affidavit of Pancha K. Gilson and know the statements contained therein to be true.

S. H. Gilson, S. B. Milner.

"Subscribed and sworn to before me this 24" day of May, 1902. Frank D. Hobbs, Register.

EXHIBIT #27-b

Non-mineral Affidavit

"This affidavit can be sworn to only on personal knowledge, and can not be made on information and belief.

"The Non-Mineral Affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required of the entryman.

"Department of the Interior, United States Land Office, Salt Lake City, Utah

——, 1902.

"S. H. Gibson, being duly sworn according to law, deposes and says that he is the identical Attorney in fact for Pancha K. Gibson, who is an applicant for Government title to the lot 7 sec. 3, W. 2 N. E. 4 & N. W. 4 S. E. 4 sec. 10 Tp. 13 So. R. 11 E; that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same, that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper; but is chiefly valuable for its deposits of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel,

or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially coal land, and that application therefor is not made for the purpose of fraudulently obtaining title to mineral land, [fol. 470] but with the object of securing said land for coal purposes, and that his post-office address is Salt Lake City, Utah.

S. H. Gilson.

"I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Salt Lake City, within the Utah Land district, on this 24th day of May, 1902.

Frank D. Hobbs, Register.

"Note.—The officer before whom the deposition is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

"Revised Statutes of the United States, Title LXX—Crimes, Chap. 4

"Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two

thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750.)

EXHIBIT 27-c

Coal—Final Proof

Prior Possession, with Power of Attorney

In the United States Land Office at Salt Lake City, Utah

STATE OF UTAH,
County of Salt Lake, ss:

I, Pancha K. Gilson, 805 Park Ave. of Salt Lake City, Utah, claiming under the provisions of the revised statutes [fol. 471] of the United States relating to the sale of coal lands of the United States the right of purchase to the Lot 7, Sec. 3, W. ½ N. E. ¼ & N. W. ¼ S. E. ¼ of section 10, Tp. 13 S., R. 11 E. S. L. M., containing 160 acres, subject to sale at the United States Land Office at Salt Lake City, Utah, do solemnly swear that I am over 21 years old, a native born citizen of the United States, born in the State of Utah, and unmarried, and that I have never had the right to purchase under the aforesaid provisions of law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of $1100.00 Dollars, the nature of such improvements being as follows: A cabin, a tunnel and several open cuts exposing coal, that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am not well acquainted with the character of said described land, and with each and every legal subdivision thereof, not having frequently passed over the same; that my knowledge of said land is not such as to enable me to testify understandingly with regard thereto, such information being possessed by my agent. That a non-mineral affidavit is attached hereto

sworn to by S. H. Gilson my duly authorized agent and attorney in fact showing the character of said described land.

Pancha K. Gilson.

Subscribed and sworn to before me this 21st day of Mch. 1903, at my office in Salt Lake City, Utah.
L. H. Gray, Notary Public. (Seal.)

Power of Attorney

STATE OF UTAH,
County of Salt Lake, ss:

Know all men by these presents, That I, Pancha K. Gilson, having applied to enter the Lot 7, Sec. 3 W. ½ N. E. ¼ & N. W. ¼ S. E. ¼ of Section 10 Tp. 13 S., R. 11 E., S. L. M., containing 160 acres, hereby authorize and empower S. H. Gilson to complete the necessary proof therein; especially to make the required non-mineral affidavit, as I am assured and believe that he is well acquainted with the character of each and every subdivision of said described land, hereby ratifying and confirming all acts that my said agent shall lawfully do by virtue hereof.

Pancha K. Gilson.

Witness L. H. Gray.

Subscribed and sworn to before me this 21st day of Mch., 1903, at my office in Salt Lake City, Utah.
L. H. Gray, Notary Public. (Seal.)

[fol. 472] In the United States Land Office, Salt Lake City, Utah

STATE OF UTAH,
County of Salt Lake, ss:

S. H. Gilson, being duly sworn according to law deposes and says that I am the agent and attorney in fact of Pancha K. Gilson, who is an applicant for Government title to the Lot 7, Sec. 3, W. ½ N. E. ¼ & N. W. ¼ S. E. ¼ of Section 10, tp. 13 S., R. 11 W. Salt Lake Meridian, and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my personal knowledge of said land is such as to enable me

to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver or copper; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that said land is within fifteen miles of a completed railroad, to-wit: about 12 miles. So help me God.

S. H. Gilson.

Subscribed and sworn to before me this 21st day of Mch., 1903, at my office in Salt Lake City, Utah.
L. H. Gray, Notary Public. (Seal.)

STATE OF UTAH,
County of Salt Lake, ss:

The undersigned being duly sworn each for himself deposes and says that I have read the foregoing and accompanying proof of affidavit of purchase of coal lands of Pancha K. Gilson for the lot 7, Sec. 3, W. ½ N. E. ¼ & N. W. ¼ S. E. ¼ of Section 10, Tp. 13 S., R. 11 E., S. L. M., containing 160 acres, and know of my own personal knowledge that the statements made therein are true.

That said applicant is now in the actual possession of said land and the coal mines thereon; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same, that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver or copper, and that there is not within the lim-ts of said land, to my knowledge, any valuable deposit of gold, silver, or copper; that the land contains no salt spring, or deposits of salt in any form [fol. 473] sufficient to render it chiefly valuable therefor. Said land is within fifteen miles of a completed railroad, to-wit, about 12 miles. So help me God.

S. B. Milner, A. R. Talamantes.

Subscribed and sworn to before me this 21st day of Mch., 1903, at my office in Salt Lake City, Utah. L. H. Gray, Notary Public. (Seal.)

EXHIBIT 27-d

No. 169. Land Office at Salt Lake City, Utah

March 21st, 1903.

I, Pancha K. Gilson, of Salt Lake City, Utah, do hereby apply to purchase the Lot 7, Sec. 3, W. ½ N. E. ¼ & N. W. ¼ S. E. ¼ Section 10, in township 13 S. of Range 11 E. S. L. M. containing one hundred sixty acres, according to the returns of the Surveyor General, for which I have agreed with the Register to give at the rate of Twenty dollars per acre.

Pancha K. Gilson.

I, Frank D. Hobbs, Register of the Land Office at Salt Lake City, Utah, do hereby certify, that the Lot above described contains one hundred sixty acres, as mentioned above, and that the price agreed upon is Twenty dollars per acre.

Frank D. Hobbs, Register.

EXHIBIT 27-e

Receiver's Coal Receipt.

Coal Entry No. 169

Receiver's Office at Salt Lake City, Utah

March 31, 1903.

Received from Pancha K. Gilson of Salt Lake City, Utah, the sum of Thirty-two hundred dollars and — cents, being in full for the Lot 7, Sec. 3, W. ½ N. E. ¼ & N. W. ¼ S. E. ¼ of Section No. 10 in Township No. 13, S. of Range 11 E., S. L. M., containing One Hundred sixty acres and — hundredths at $20.00 per acre.

$3,200.00.

Geo. A. Smith, Receiver.

(Endorsed): Receiver's Coal Receipt. Coal Entry —. In case of Pancha K. Gilson. S. 34 & 10, T. 13 S. R. 11 E. Land Office at Salt Lake City, Utah.

[fol. 474] EXHIBIT 27-f

Register's Final Coal Certificate of Entry

Coal Entry No. 169

Land Office at Salt Lake City, Utah

March 21st, 1903.

It is hereby certified that in pursuance of the Revised Statutes of the United States relating to Coal Lands, Pancha K. Gilson residing at Salt Lake City in Salt Lake County, State of Utah, on this day purchased of the Register of this office the Lot 7 of Sec. 3, W. ½ N. E. ¼ & S. E. ¼ of Section No. 10 in Township No. 13 S., of Range No. 11 E. of the S. L. Principal Meridian, Utah, containing 160 acres, at the rate of $20.00 dollars per acre, amounting to $3200.00 dollars and — cents, for which the said Pancha K. Gilson has made payment in full as required by law.

Now, therefore Be It Known that, on presentation of this certificate to the Commissioner of The General Land Office, the said Pancha K. Gilson shall be entitled to receive a Patent for the land above described if all be found regular.

Frank D. Hobbs, Register.

Patent to certain reservation according to proviso to the Act of Aug. 30, 1890.

(Endorsed): Coal Land. Coal Entry No. 169, Cash Entry. Land Office at Salt Lake City, Utah. Sec. 3 & 10, Tp. 13 S. Rg. 11 E. Pat. May 8, 1903. Rec. Vol. 453, Page 113. Miscellaneous. 19-169.

EXHIBIT 27-g

Mineral Division

C. E. 169. Land District Salt Lake.
Name of claim: ——.
Kind of deposit: Coal.
21—4454.
Date of location C. D. S.: Mch 31, 1902.
Location recorded: ——.
Survey made: ——.

Survey approved: ——.
Improvements: $1,100.00.
Reservation: ——; Tp. suspended: ——.
School Section: ——.
[fol. 475] Connection: ——.
Posting on claim: ——.
Application for patent: Mch. 21, 1903.
Title: Corro. Afft. Plt.
Agreement of publisher: ——.
Publication: ——.
Continuous posting: ——.
Posting in office: ——.
Charges and fees paid: ——.
Adverse claims: ——. Protests: ——.
Date of entry: Mch. 21, 1903.
Claimants: Pancha K. Gilson.
Citizenship: Native.
Area entered, 160; Amt. paid, $320.00.
Non-mineral proof: ——; Use or occupancy: ——.
Proof of no known veins: ——.
Deputy Surveyor's Report on placers: ——.
Tract Books—conflicts, No.: ——.

E. C. T., Examiner.

4/27, 1903.

"(Witness:) Exhibit 27 is a coal declaratory statement of Pancha K. Gilson for the land described therein.

"Exhibit 27-a is an application to amend said coal declaratory statement.

"Exhibit 27-b is a non-mineral affidavit accompanying said application to amend.

"Exhibit 27-c is an application to purchase by said Pancha K. Gilson, accompanied by power of attorney to S. H. Gilson and affidavit by S. H. Gilson as to the character of the land and corroborating affidavits as to the character of the land.

"All of these papers relate to the amended descriptions. The one given in the application given to amend. I do not want the record to show that has reference to any of the property described as to the subject matter of this complaint.

"Exhibit 27-d is an application to purchase made by Pancha K. Gilson and attached to it the agreement of the

Register as to the price of the land. The technical name given to this paper is an 'Application to Purchase.' This is an application by Pancha K. Gilson for the purchase of the lands last described, being 160 acres, in which she agreed to pay $20.00 or more for the same. That was the highest coal price at that time.

[fol. 476] "Exhibit 27-e is the Receiver's Receipt, showing the payment of $3200.00 for 160 acres of land, described in the application of Pancha K. Gilson No. 169.

"Exhibit 27-f is Register's Final Coal Certificate of Entry No. 169 to Pancha K. Gilson for the land described, on the presentation of which she was entitled to a patent. From the signatures to the various certificates and receipts I would take it that they were the orig-nal papers.

"Exhibit 27-g is an Examiner's Slip.

"Having my attention called to the original records which relate to the application of a woman by the name of Hulda Sjoberg Hill, which is Coal Cash Entry No. 170, for the purchase of 160 acres of coal lands, described, as follows: the E. ½ of the N. E. ¼ of Section 9, S. E. ¼ of N. W. ¼, N. W. ¼ of S. W. ¼ of Section 10, township 13 S. of range 11 E. situated in Carbon County, Utah; taking the same course as I did in the preceding case, I will say that Exhibits 28 to 28-g are the papers showing the procedure taken by said Hulda Sjoberg Hill to procure the lands described therein, and are practically the same steps as were taken by Mr. Milner as evidenced by Exhibits 27 to 27-g above set forth. The price was $20.00 per acre, making in all $3,200.00.

"Exhibit 28-e is a Receiver's Coal Receipt No. 170 showing the payment of $3200.00 by Hulda Sjoberg Hill for the land described in her amended declaratory statement.

"Exhibit 28-f is Register's Final Coal Certificate No. 170 to Hulda Sjoberg Hill describing the land embraced in her amended declaratory statement, upon presentation of which she was entitled to a patent to the land described.

"Exhibit 28-g is an Examiner's Slip.

"By Mr. Maynard: 'I now offer in evidence as part of complainant's proof in this case Exhibit 28 and Exhibits 28-a-b-c-d-e-f and g.'

"By Mr. Edwards: 'I object to each and every of said Exhibits being introduced or received in evidence for the reason that each and every one of the same are incompetent, irrelevant and immaterial.'

"Exhibit 29 and 29-a-b-c-d-e-f and g are similar documents, being Coal Cash Entry No. 171, in which the appli- [fol. 477] cant is John Milner, in which he applies to purchase 160 acres of coal land in Carbon County, Utah, particularly described, as follows: S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼ and the N. W. ¼ S. E. ¼ and N. E. ¼ S. W. ¼ of Section 9, township 13 S. range 11 E., and taking the same course as in the two preceding entries, Exhibit 29 is a Coal Declaratory Statement of John Milner describing the lands aforesaid.

"Exhibit 29a is an application to amend said declaratory statement by John Milner, so as to describe the S. E. ¼ of N. W. ¼, S. W. ¼ of N. E. ¼, and N. ½ of S. E. ¼ of Section 9, township 13 South of range 11 East, accompanied by non-mineral affidavit. The mineral affidavit is made by S. H. Gilson.

"Exhibit 29-b, page 1, is Coal Final Proof of John Milner for the lands described in his amended coal declaratory statement.

"Page 2 is an affidavit by his attorney in fact, or S. H. Gilson, as to the character of the land.

"Page 3 is a corroborating affidavit as to the character of the land by S. B. Milner and A. R. Talamantes.

"Page 4 is a power of attorney from John Milner to S. H. Gilson.

"Exhibit 29-c is an affidavit as to the citizenship of John Milner himself.

"Exhibit 29-d is an application to purchase by John Milner and an agreement attached thereto by the Register that the price agreed upon is $20.00 per acre for the land.

"Exhibit 29-e is Receiver's Coal Receipt No. 171 to John Milner showing the payment by him of $3200.00 for the land described in his amended declaratory statement.

"Exhibit 29-f is Register's Final Coal Certificate of Entry No. 171 to John Milner including the lands embraced in his amended declaratory statement, upon the presentation of which to the Commissioner of the General Land Office, he was entitled to patent.

"Exhibit 29-g is an Examiner's Slip. In this case as in the preceding I understand these are the original papers filed in the Local Land Office and transmitted to the General Land Office.

"By Mr. Maynard: 'Now I offer in evidence as part of complainant's proof, Exhibit 29—29-a to g.'

[fol. 478] "By Mr. Edwards: 'I object to the introduction or receipt of the same in evidence and to each and every one of said exhibits for the reason that each and every one is incompetent, irrelevant and immaterial.

"The papers marked Exhibits 30, 30-a, b, c, d, e and f are similar to those heretofore set forth and constitute the papers in Coal Cash Entry No. 180 of Cyrus L. Gilson, in which he applied to purchase 80 acres of coal land described as follows: E. ½ S. E. ¼, section 10, township 13 S. R. 10 E., Carbon County, Utah, at $20.00 an acre, making a total purchase price of $1600.00.

"Exhibits 31, 31-a-b-c-d-e and f constitute the papers connected with Coal Cash Entry No. 181, in which the applicant Harley O. Milner applies to purchase 160 acres of coal land described as follows: N. W. ¼ N. E. ¼, N. E. ¼ N. W. ¼, S. ½ N. W. ¼, section 14, township 13 south, range 10 east, situated in Carbon County, Utah. These were offered and received in evidence as part of complainant's proof, and each and every one of said exhibits were objected to by Mr. Edwards for the reason that each and every one of the same are incompetent, irrelevant and immaterial.

"Coal declaratory statement No. 2272 was made by Mrs. Ethel Gilson for the N. ½ N. W. ¼, N. ½ N. E. ¼, section 21, township 13 south, range 12 east, and attached thereto is a power of attorney from her to S. H. Gilson; a non-mineral affidavit by S. H. Gilson and corroboration of said non-mineral affidavit by C. H. McKindrick and John R. Stewart.

"Coal declaratory statement No. 2274 is made by Julia W. Jenkins May 7, 1904, for the W. ½ N. W. ¼, S. E. ¼ N. W. ¼, S. W. ¼ N. E. ¼, section 22, township 13 south, range 12 east. Attached to it is power of attorney from the applicant to S. H. Gilson, and corroborating non-mineral affidavit by C. H. McKindrick and John R. Stewart.

"In the coal declaratory statement No. 2272 Mrs. Ethel Gilson alleges that she came into possession of said tract on the 15th day of May, 1901. That she has expended in labor and improvements the sum of $125.00; one tunnel 20 feet long in three cuts 15 to 20 feet, all exposing coal.

"In coal declaratory statement No. 2274 Julia W. Jenkins, the applicant, alleges she came into possession of said land

on the 15th day of May 1901. That she expended in labor [fol. 479] and improvements on said mine the sum of $50.00 in five open cuts. I have coal declaratory statement No. 2275 filed by Linnie Rutt May 10, 1904, for the N. ½ N. E. ¼, S. E. ¼ N. E. ¼, section 22, and S. W. ¼ N. W. ¼ of section 23, township 13 south, range 12 east, in which she alleges first possession of the land the first day of May, 1902; that she expended in labor and improvements on said mine the sum of $40.00 in five cuts, all exposing coal.

"Power of attorney from the applicant to S. H. Gilson and non-mineral affidavit by S. H. Gilson and corroborating non-mineral affidavits by John R. Stewart and C. H. McKindrick. This was filed in the Local Land Office May 10, 1904.

"Coal declaratory statement No. 2276 is filed by L. M. Rutt May 11, 1904, for the N. E. ¼ of section 25, township 13 south, range 12 east. That she came into possession of the tract on the — day of May, 1902. That he had expended in labor and in improvements on said mine the sum of $25.00 in one open cut.

"The power of attorney from the applicant to S. H. Gilson, a non-mineral affidavit by S. H. Gilson and corroborating non-mineral affidavit by C. H. McKindrick and John R. Stewart.

"Coal declaratory statement No. 2279 is filed by Lulu Milner May 10, 1904, on the E. ½ N. E. ¼, section 18, and S. ½ S. E. ¼, section 7, township 13 south, range 12 east. Alleges possession of the tract on the first day of May, 1902. That she had expended in labor and improvements on said mine the sum of $100.00 in two tunnels ten feet—several open cuts, all exposing coal. The power of attorney from applicant to S. H. Gilson, a non-mineral affidavit by S. H. Gilson, corroborating non-mineral affidavits by A. R. Talamantes and C. H. McKindrick, also a certificate by the County Recorder as to the qualifications of one Harry H. Strong of Milner, Idaho, Justice of the Peace.

"Coal declaratory statement No. 2255 is filed April 7, 1905, by Jacob Hill for the W. ½ N. W. ¼ (Lots 1 and 2) section 30, and S. W. ¼ S. W. ¼ (lot 4), section 19, township 13 south, range 13, alleging possession the 15th day of April, 1901. That he had expended in labor and improvements on said mine the sum of $300.00 in opening tunnel and building wagon road. A power of attorney from the appli-

cant to S. H. Gilson, a non-mineral affidavit by S. H. Gilson and corroborating non-mineral affidavit by H. D. Heist and Chas. H. McKindrick.

[fol. 480] "Coal declaratory statement No. 2296 is filed by Samuel N. Randolph, W. ½ S. W. ¼, section 10, N. ½ N. W. ¼, section 15, township 13 south, range 10 east, alleging possession of the tract on the 13th day of August, 1904. That he had expended in labor and improvements on said mine the sum of $25.00 in one open cut on coal vein exposing same, being 20 feet long by 8 feet wide, and 8 or 10 feet in depth, also corroborating affidavits by S. H. Gilson and S. B. Milner.

"Coal declaratory statement No. 2364 is filed by Hosea Hill April 7, 1905, for the N. W. ¼ of N. W. ¼, section 32, N. ½ of N. E. ¼ and N. E. ¼ N. W. ¼, section 31, township 13 south of range 13 east, alleging possession of the tract on the 15th day of April, 1901. That there has been expended for labor and improvements on said mine the sum of $200.00 in opening cuts and tunnels. The power of attorney from the applicant to Samuel H. Gilson, the non-mineral affidavit by Samuel E. Gilson and corroborating non-mineral affidavits by Charles H. McKindrick and H. D. Heist. There is also with said application a copy of a letter to the Board of Land Commissioners and evidence of service by (Registry) return card which is also attached.

"The letter reads as follows:

"'Salt Lake City, Utah, April 8, 1905.

"'State Board of Land Commissioners, Salt Lake City, Utah.

"'GENTLEMEN: Hosea Hill of Salt Lake City has filed in this office his application to make a coal declaratory statement for the N. W. ¼ N. W. ¼, section 32, N. ½ of the N. E. ¼, N. E. ¼ of N. W. ¼, section 31, township 13 south, range 13 east, alleging first possession April 15, 1901; that he has located and opened a valuable mine of coal thereon. This application has been suspended because of a conflict as to the tracts in section 32 with the claims of the State of Utah under its grant of School Lands; the State is hereby notified thereof and allowed thirty days to show cause, if any it has, why said application to make a coal declaratory statement should not be allowed.

Very respectfully,——, Register.'

"That coal declaratory statement bears the following endorsements: 'April 7, 1905, suspended because of conflict with School Section April 8 State Board notified sixty days. July 5, 1905, no response by State and filing allowed.'

[fol. 481] "I have coal declaratory statement No. 2365, filed April 7, 1905, by Alice A. Gilson for the S. W. ¼ of N. W. ¼ Sec. 33 S. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼ Sec. 32, Township 13 S. Range 13, E. alleging possession of such tract on the 15th day of April, 1901, that there was expended in labor and improvements on said mine the sum of $200.00 in running tunnel, corroborating affidavits by Charles McKindrick and Samuel H. Gilson, also copy of letter to the State Board of Land Commissioners and registry return card showing the receipt of said letter by the State Land Board. The letter reads as follows:

'Salt Lake City, Utah, April 8, 1905.

'State Board of Land Commissioners, Salt Lake City.

'GENTLEMEN: Alice A. Gilson of Salt Lake City has filed in this office her application to make a coal declaratory statement for the S. W. ¼ of N. W. ¼ of Sec. 33 S. ½ of N. E. ¼ and S. E. ¼ of N. W. ¼ of Section 32, Township 13, S. Range 13 E. alleging first possession April 15, 1901, and that she has located and opened a valuable mine of coal thereon. This application has been suspended because of conflict as to the tracts in section 32 with claims of the State of Utah on its grant of school lands. The State is hereby notified thereof and allowed thirty days to show cause, if any it has, why said application to make coal declaratory statement should not be allowed.

Very respectfully, —— ——, Register.'

"The letter bears the following endorsements:

"'April 7, 1905, Suspended because of conflict with school Section.

"'April 8, 1905, State notified to show cause, sixty days. Notice by registered mail.

"'July 5, 1905, No response by State and filing allowed.

"I have coal declaratory statement No. 2367 filed July 6, 1905, by Thos. H. Jenkins for the N. ½ and S. E., N. E. ¼ of Sec. 22 and the S. W. of the N. W. ¼ of Sec. 23, Township

13 S. Range 12 E. alleging possession of the land on the 22nd day of June, 1905, that there has been expended in labor and improvements on said mine the sum of $10.00 in tunneling in vein of coal. Power of attorney from the applicant to Samuel H. Gilson, a non-mineral affidavit by Samuel H. Gilson and corroborating non-mineral affidavits by Clarence Milner and S. P. Milner.

[fol. 482] "I have coal declaratory statement 2368 filed July 11, 1905, by August Tadje for the S. ½ of S. E. ¼ of Sec. 7 E. ½ of N. E. ¼ Sec. 18, Township 13, S. Range 12 E. alleging possession of tract the 15th day of May, 1905, that he had expended in labor and improvements on said mine the sum of $100.00 in running tunnel on vein of coal. With Power of Attorney from applicant to Samuel H. Gilson. A non-mineral affidavit by Samuel H. Gilson and corroborating non-mineral affidavits by J. C. McKendrick and Geo. W. McCall.

"I have coal declaratory statement 2369 filed July 11, 1905, by Philip Tadje for the N. E. ¼ Sec. 25 Township 13, S. Range 12 E. alleging possession of tract on the 20th day of June, 1905, that he had expended in labor and improvements on said mine the sum of $25.00 in running tunnel on vein of coal. A power of attorney from Philip Tadje to Samuel H. Gilson. A non-mineral affidavit by Samuel H. Gilson and corroborating non-mineral affidavits by J. C. McKendrick and James M. Olson.

"I have coal declaratory statement 2370 filed July 11, 1905, by Sophie Tadje for the N. ½ of the N. ½ of Sec. 21, Township 13, S. Range 12 E., alleging possession of tract the 18th day of June, 1905, that she had expended in labor and improvements on said mine the sum of $25.00 in running tunnel on vein of coal. Power of attorney from the applicant to Samuel H. Gibson. Non-mineral affidavit by Samuel H. Gilson and corroborating non-mineral affidavits by J. C. McKendrick and Geo. W. McCall.

"I have coal declaratory statement 2371 filed by August J. Tadje on July 17, 1905, for the S. W. ¼ of N. E. ¼ and S. ½ and N. W. ¼ of the N. W. ¼, Sec. 22, Township 13 S., Range 12 E. alleging possession of tract on the 24th day of June, 1905, and that he had expended in labor and improvements on said mine the sum of $25.00 in running tunnel on vein of coal. Power of attorney from the applicant to Samuel H. Gilson, non-mineral affidavit of Samuel H.

Gilson and corroborative non-mineral affidavit of Clarence E. Milner and S. B. Milner. (The papers above referred to were marked as Exhibits 32 to 44, both inclusive.)"

"Mr. Maynard: I now offer in evidence as part of complainant's proof Exhibits 32 to 44, both inclusive."

"Mr. Edwards: I object to the introduction in evidence or the receipt in evidence of each and every of said Exhibits for the reason that each and every of same are incompe- [fol. 483] tent, irrelevant and immaterial. I also mean to strike out the excerpts read from the various exhibits, also the endorsements read into the record and the letters read into the record because same have not been introduced in evidence and are incompetent, irrelevant and immaterial."

"Witness: Exhibit 45 is a blue print of the original approved map of the Coal Belt Railroad on file in the United States Land Office, Salt Lake City, Utah, certified to by the Register and Receiver under date of February 7, 1910."

"Mr. Maynard: I now offer in evidence as part of complainant's proof in this case Exhibit No. 45."

"Mr. Edwards: I object to same as incompetent, irrelevant and immaterial, also to the certificate appearing thereon for the same reason, it is not within the issues made by the pleadings of this case."

"Friday, February 19, 1910.

"Cross-examination of Mr. Dunn.

By Mr. Edwards:

"I have been a clerk in the Land Office since February, 1901. The Secretary of the Interior and the Commissioner of the General Land Office printed and promulgated rules of the conduct of business in that department and in the Local Land Office. I don't know that there is any document printed which would contain all the rules during the years 1901, 1902, 1903, 1904 and 1905. I have the rules relative to State selections. I have 23 L. D. decisions of the Department of the Interior relating to public lands which contains the decisions handed down from July, 1896 to December, 1896, by the Secretary of the Interior. On page 459 of that volume is found the following:

'State Selections, Mineral Lands Circular

Department of the Interior, General Land Office, Washington, D. C.

November 27, 1896.

'Registers and Receivers, United States Land Offices.

SIRS: Hereafter, where the lands selected by the States under their grants are within a mineral belt or proximate to any mining claim, the State will be required to file with the local Land Officers with each selection list a satisfactory non-mineral affidavit covering each legal subdivision of land selected. If any lands selected are found upon examination [fol. 484] to be within a township containing any mineral entry claim or location, you will at once notify the proper State officer as to the specific tracts and require him to at once (publish) notice in some newspaper of general circulation, (to be designated by you), within the vicinity of said lands, setting forth that the State has applied for the lands designated and has filed lists for same in your office. That said lists are open to public for inspection and that a copy of same by descriptive subdivisions has been conspicuously posted in your office for inspection by persons interested and the public generally; and that you will receive protests or contests within the next sixty days for any of said tracts or subdivisions of land claimed to be more valuable for mineral than agricultural purposes.

'At the expiration of the sixty days you will make full report to this office as to any protests, contests or suggestions as to the mineral character of any such lands, together with any information you may have received in regard thereto.

'You will also notify the proper State officers that a failure to make the required publication within thirty days will result in the cancellation of the selections referred to upon same being reported to this office.

'The notice will be published once a week for ten consecutive weeks.

'The original lists with proper notations as to the lands within mineral townships will be duly forwarded to this office without awaiting the publication of notice that proper action may be taken in respect to the remaining lands.

'Circular instructions of July 9, 1891 (19 L. D. 21) as far as the same are made applicable to state selections are accordingly modified.

Very respectfully, S. W. Lemoreux, Commissioner.

"Approved: David R. Francis, Secretary.

"(The foregoing circular was offered in evidence and read into the record by Mr. Edwards as part of the cross-examination and was objected and excepted to by Mr. Maynard.)

"I have volume 19 of Land Decisions handed down by the Secretary of the Interior from July, 1894, to December, 1894. On page 21 of said volume is found the following:

[fol. 485] 'Railroad Selections—Mineral Lands

Instructions, Secretary Smith to the Commissioner of the General Land Office July 9, 1894

(J. I. H.) (J. L. McC.)

'In the mat-er of the selection, by railroad companies, of lands in satisfaction of their grants, the following rules and regulations will be observed in determining whether the lands selected are mineral or non-mineral lands:

'(1) Where the lands have been returned by the Surveyor General as mineral, a hearing may be had to determine the character of the land, under Rules 110 and 111 of Rules and Regulations issued December 10, 1891, controlling the disposal of mining claims.

'(2) Whether the lands selected by the company are within a mineral belt, or proximate to any mining claim, the railroad company will be required to file with the local land officers an affidavit, by the land agent of the company, which affidavit shall be attached to said list when returned, setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employes of the company, as to their mineral or agricultural character, and that, to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

'Upon receipt of said list you will cause it to be examined, and a clear list to be prepared of all lands embraced therein that are not within a radius of six miles from any mineral

entry, claim or location, which list shall be transmitted to the department for its approval. If any of the lands embraced in said list of selections are found upon examination to be within a radius of six miles from any mineral entry, claim or location, you will cause a supplemental list of such lands to be prepared, and return the same to the register and receiver of the district in which they are situated, and notify the railroad company that they have been so returned. The register and receiver will at once cause notice to be published in such newspapers as shall be designated by the Commissioner of the General Land Office containing a statement that the railroad company has applied for a patent for the lands, designating the same by townships, and has filed lists of the same in the local land office; that said lists are open to the public for inspection; that a copy of the same, by descriptive subdivisions, has been conspiculously posted in said land office for inspection by [fol. 486] persons interested, and the public generally; and that the local land officers will receive protests, or contests, within the next 60 days, for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.'

'At the expiration of said 60 days, the register and receiver will return to the Commissioner of the General Land Office this said supplemental list, noting thereon any protests or contests, or suggestions, as to the mineral character of any such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list. After the same shall have been returned by the register and receiver, you will first eliminate from said supplemental list all the lands that have been protested, or contested, or claimed to be more valuable for mineral than for agricultural purposes, or concerning which any suggestion has been made as to their mineral character. The remaining lands you will certify to this department for approval and patenting as agricultural.

'In regard to lands protested or contested or claimed to be mineral, or concerning which any suggestion has been made, or report by the register and receiver, as to their mineral character, you will order a hearing to be had by the local land officers in each case, after giving due notice to the persons furnishing such information, as to the rail-

road company, under the existing rules and regulations of the department concerning hearings in cases where the land has been returned as mineral land.

'The railroad company shall pay to the register and receiver the cost of advertising said lands in the manner set forth.

'You are further instructed that all lists which have been heretofore prepared in accordance with any rules, regulations or instructions of the Secretary of the Interior, where such rules have been complied with, (such as furnishing affidavits showing the non-mineral character of the lands in accordance with the instructions of the Interior Department) and said mineral affidavits furnished for each subdivision of 40 acres, shall be excepted from the terms of the foregoing regulations. Also where lists of selections are now pending of lands returned by the Surveyor General as mineral where hearings have been had in accordance with Rules 110 and 111 of Rules and Regulations of December 10, 1891, above referred to, and the local officers have determined that said lands are non-mineral in character, and such determination has been approved by the General Land Office, such lands shall be submitted to the department for [fol. 487] approval, without further investigation, although they may be within six miles of any mineral claim or location, unless since said hearing mineral claims or locations have been made or any tract embraced in said lists, in which event you will eliminate said tract from said list, and hold the same for further investigation.

'State Selections—Mineral Lands

Instructions, Secretary Smith to the Commissioner of the General Land Office, July 9, 1894

(J. I. H.) (J. L. McC.)

'I am in receipt of your communication of June 18, 1894, transmitting for examination and approval draft of a circular letter designed to put into operation the instructions of this department relative to lists of State selection of lands within what are known or regarded as mineral belts. I return the same without approval and direct that where lands selected by any State, under the various grants, are within what are known or regarded as mineral belts, or in prox-

imity of lands claimed or returned as mineral, the State or its selecting agent shall be required to comply with the rules and regulations this day promulgated relative to selections of lands similarly situated, within the limits of railroad grants.'

'In the circulars there are rules or regulations or instructions from the Secretary of the Interior, or the Commissioner of the General Land office that amplify these rules during the years 1901, 1902, 1903, 1904 and 1905. I have circular commonly called 'Mining Circular' issued by the General Land Office under date of December 10th, 1891, approved by the Secretary of the Interior on December 10th, 1891. On page 36 of that circular is found Rule 110:

''(reads:) 'Hearings to determine the character of land, as practically distinguished, are of two kinds:

'(1) Where lands which are sought to be entered and patented as agricultural are alleged by affidavit to be mineral, or when sought as mineral their non-mineral character is alleged.

'The proceedings relative to this class are in the nature of a contest between two or more known parties.

'(2) When lands are returned as mineral by the Surveyor General. When such lands are sought to be entered [fol. 488] as agricultural, notice must be given by publication for 30 days, with posting in the local office for the same period.

'111. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead or gravel deposits;

to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular 10-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

'112. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular 10-acre subdivisions such crops are raised; also which of these subdivisions such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

'113. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

'114. When the case comes before this office, such decision will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land, the necessary instructions will be given to enable the proper party at his own expense, to have the work done, at his option, either by United States deputy, county or other local surveyor; the survey in such case, where the claims to be segregated are vein or lode [fol. 489] claims, must be executed in such manner as will conform to the requirements in Section 2320 U. S. Revised Statutes as to length and width and parallel end lines.

'118. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days publication of notice, and posting of diagrams and notices, as a preliminary step; and often, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations;

that he or his grantors have expended, in actual labor and improvements, an amount of not less than $500.00 thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost where a survey is required, after which he can enter and pay for the land embraced by his claim.'

"As to whether or not these rules and regulations that have been read into the record were in full force and effect during the years 1901 to 1905 and bearing on that matter, I have also circulars of June 24, 1899, and December 15, 1897, which modified the rules. I have mineral circular approved December 15, 1897, by the Secretary of the Interior. That is the circular itself. I read now from that circular:

'Hearings to Determine Character of Lands

'101. The rules of practice in cases before the United States District Land Offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the mineral character of lands.

'102. No public land shall be withheld from entry as agricultural land on account of its mineral character except such as is returned by the Surveyor General as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner herein described.

'103. Hearings to determine the character of lands are practically of two kinds as follows:

'(1) Lands Returned as Mineral by the Surveyor General

'When such lands are sought to be entered as agricultural under laws which require the submission of final proof after [fol. 490] due notice by publication and posting, the filing of the proper non-mineral affidavit in the absence of allegations that the land is mineral, will be deemed sufficient as a preliminary requirement. A satisfactory showing as to the character of land must be made when final proof is sub-

mitted. In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is not required, notice thereof must first be given by publication for 60 days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed if otherwise regular.

'(2) Lands Returned as Agricultural and Alleged to be Mineral in Character

'Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

Railroad and State Selections

'104. Where a railroad company seeks to select lands not returned as mineral, but within six miles of any mining location, claim, or entry, or where in the case of a selection by a State, the lands sought to be selected are within a township in which there is a mining location, claim, or entry, publication must be made of the lands selected at the expense of the railroad company or State for a period of 60 days with posting for the same period in the land office for the district in which the lands are situated, during which period of publication the local land officers will receive protests or contests for any of said tracts or subdivisions of land claimed to be more valuable for mining than for agricultural purposes.

'105. At the expiration of the period of publication the register and receiver will forward to the Commissioner of the General Land Office the published list, noting thereon any protests or contests, or suggestions as to the mineral character of any such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list, when a hearing may be ordered.

[fol. 491] '106. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed; any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow surface description or of the deep cement, blue lead or gravel deposit; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular 10-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

'107. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular 10-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

'108. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of the lands which have been entered upon under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

'109. When the case comes before this office such decision will be made as the law and the facts may justify; in cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party at his own expense will be required to have the work done, at his option, either by United States deputy, county, or other local surveyor; application therefor must be made to the register and re-

ceiver, accompanied by a description of the land to be segregated, and the evidence of service upon the opposite party of notice of his intention to have such segregation made; the register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. [fol. 492] The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320 of the United States Revised Statutes, as to length and width and parallel end lines.

'113. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land he must proceed as in other cases, in accordance with the foregoing regulations.'

STATEMENTS RE EXHIBITS 46, 47, 48

"(Mr. Edwards also offered in evidence at this point the printed rules and regulations of the Commissioner of the General Land Office, approved by the Secretary of the Interior June 24, 1899, entitled 'General Land Office of the United States. Mining Laws and Regulations thereunder.' This document is marked Exhibit 46.

"Also offered in evidence rules and regulations of the General Land Office adopted by the Commissioner of the General Land Office and approved by the Secretary of the Interior on July 26, 1901, entitled 'General Land Office; United States Mining Laws and Regulations thereunder.' The document being marked at 'Exhibit 47.')

"Exhibits 46 and 47 do not contain all the rules and regulations in force during the years 1901 to 1905, both inclusive, in reference to contest cases and hearings and contests. I have a copy of the Rules of Practice approved by the Secretary of the Interior July 15, 1901. (The last mentioned document was offered in evidence by Mr. Edwards and marked 'Exhibit 48.')

"The rules and regulations which have been introduced in evidence do not constitute all the rules and regulations from 1901 to 1905 in volume 29 of the Decisions of the Department of the Interior relating to public lands, on pages 725 to 746 will be found Rules of Practice, approved January 27, 1899.

This volume can be found in many law libraries in Salt Lake City and elsewhere. It is practically the same as the rules here. It changes the rules contained in Exhibit 48 in that it adds a new one known as Rule 8½.

"I have also here a coal circular, Coal Land Law and regulations thereunder, General Land Office, July 31, 1882; reprint with extract from circulars of August 7, 1895, June 27, 1900 and January 5, 1904. With the exception of the circulars notes in the latter part of the description, this is the [fol. 493] same circular as was used during these periods from 1882 and including 1902. For 1903, 1904 and 1905 it would be the same. The circular on page 14 is the only one that was in 1904. I find that these were the regulations of the Department of the Interior and General Land Office during the years 1901 to 1905. (Exhibit 49 was offered in evidence by Mr. Edwards. It is a pamphlet endorsed 'Coal Land Law and Regulations thereunder. General Land Office, July 31, 1888. Reprints with extract from circulars of August 7, 1895, June 27, 1900 and January 5, 1904.) As I understand them, the rules and regulations that have been introduced in evidence constitute all the rules and regulations regulating the selection of lands by the State of Utah during those years. Forms of all mineral affidavits were prescribed by the Commissioner of the General Land Office and the Secretary of the Interior and forms of these have been introduced in evidence in my testimony. I refer to Exhibit 24. That is the only form of non-mineral affidavit required in the land office under the rules and regulations. In particular cases a certain non-mineral affidavit, as on the State lists, differs very materially from that particular non-mineral affidavit that you have shown me. The non-mineral affidavit prescribed by the Department of the Interior is Exhibit 24 and the other non-mineral affidavit that I had reference to is the one which is attached to the selection lists presented by the State of Utah. I do not know who prescribed the forms used by the State of Utah but I understood it was prepared by the State Land Board. I have never found any communications from the Commissioner of the General Land Office or the Secretary of the Interior in reference to these forms upon which the applications were made by the State until 1903. The lands involved in this litigation, so far as they are described in list 32, being Exhibit 7 were not returned by the Surveyor General as

mineral or coal lands. I was not an employee of the local land office of Salt Lake on December 18, 1900, so that all I know about the different proceedings that resulted in the approval of the selection list by the Secretary of the Interior is merely what the record of our office shows and under the rules these selection lists were transmitted to the Commissioner of the General Land Office, immediately upon receipt thereof by the Local Land Office and the making of the notices as to the character of the land as shown by the tract books.

"The notation 'Posted, February 1, 1901, C. D. J.' upon Exhibit 7 is a notation made by someone in the General Land [fol. 494] Office, I would take it. It would imply to my mind that it was put on the tract books in the General Land Office on the date named there by the party whose initials are on it. It was posted in the tract books in the General Land Office as of that date showing it had been segregated from the public domain.

"In List No. 52, that portion describing the lands, the subject matter of this suit, were all returned as coal lands by the Surveyor General of Utah. At the time of the receipt of the list I was an employee in the land office, Salt Lake. I made the notations myself on that particular list. I caused a notice to be published in a newspaper, to wit: the Eastern Utah Advocate of Price, as per Exhibit 25, setting December 21, 1903 at 10 o'clock a. m. for hearing. On that date the State submitted affirmative proof as to all of these lands in the shape of non-mineral affidavits in the form as per Exhibit 24. I could not state who made the affidavits except as shown by Commissioner's letter N of November 7, 1904 which has been read into the record. It states that the proof consists of a number of affidavits by parties who each allege on personal knowledge the non-mineral character of said tracts. It was not a custom in our office to keep a record as to how many affidavits were furnished or by whom they were made. I do say, however, that we would transmit affidavits in the usual and required form to the Commissioner of the General Land Office, as stated in that letter.

"Rule 8½ is in Exhibit 48 but is not in the citation given by me in volume 29 of the Decisions of the Department of the Interior relating to public lands commencing on page 726 and I wish to be understood as saying that the rules and regulations as set forth in that Exhibit 48 contain all the

rules and regulations contained in this citation of Volume 29 of the Land Decision and in addition thereto, contains what is known as 'Rule 8½.'

"I have no personal knowledge as to the notations that were made on the list in the General Land Office in Washington and I do not know what they mean.

"None of the lands in list No. 67 and particularly that portion of the land described therein which are the subject matter of litigation in this suit were returned as coal lands or mineral lands by the Surveyor General, and the only proof submitted by our office orginally at the time of transmitting the selection list was the selection list itself and the affidavits attached thereto.

[fol. 495] "The north half of Section 33, Township 12, South Range 11 East, described in List No. 71, was not returned by the Surveyor General as mineral or coal. As to the balance of the lands, they were returned as coal and thereupon we caused notice to be published in the form as per Exhibit No. 25 and set the hearing for June 17, 1902 at 10 a.m. The record shows that affirmative proof was transmitted to the General Land Office, August 13, 1902. There is nothing, however, showing the particular date upon which the proof was filed but proof of the nature or description including affidavits were filed some time prior to that date. I refer to non-mineral affidavits such as Exhibit No. 24. I do not know how many of these affidavits were filed prior to the date of hearing. Affirmative proof means that more than one non-mineral affidavit was furnished so that, so far as the record discloses, there was more than one non-mineral affidavit filed, an affidavit by more than one party. If affidavits other than those transmitted by us to the General Land Office were received, at the General Land Office in Washington, we would have no memorandum or information from that office of such fact.

"Referring to the letter attached to selection list No. 71, Exhibit 5, purporting to have been written by B. C. Tiffany, dated Washington, D. C., August 7, 1903, which purports to be a part of the records of the office of the Commissioner of the General Land Office, this refers to an affidavit by A. R. Talamantes. I take it it would be an affidavit filed direct with the Commissioner.

"I could not state from List No. 75, being Exhibit 6, that all of the sections 1 and 3, N. ½ of Section 11, N. ½ of Sec-

tion 12, Township 13, S. Range 10 E. Salt Lake Meridian were returned by the Surveyor General as mineral.

"Exhibit No. 5 is not clear upon that point either. The same objection is on that list as the original list. The return shows that it was either mineral or within a mineral township and that publication was had as per Exhibit 26. In further explanation I will state that there is a line drawn from the word 'mineral' and a notation which says, 'Same as marginal notation No. 4' and marginal notation No. 4 is 'March 30, 1903. Notice for publication issued to the Eastern Utah Advocate at Price and delivered at State Board of Land Commissioners personally.' Which to my mind would indicate that there is no date set for hearing and therefore that the land was not considered as returned as coal or mineral. [fol. 496] So that the absence of a date set for hearing in that notation leads me to believe that the land had not been returned as mineral or coal but, on the contrary, that the land merely existed in a township where some mining claims or mineral lands were known to exist. As to the method of procedure, a notice was published for a period of sixty days and in the event that no protest or contest or suggestion as to the mineral character of the land was filed during that period, the proof of publication was transmitted to the General Land Office with a report to that effect. I made some reference to affirmative proof having been submitted in connection with those lands. That affirmative proof referred particularly and only to those tracts in this particular list which were returned as coal land and not to these particular tracts which were not returned as coal lands. From the record before me I would state that none of the lands in this list, the subject matter of this suit, were returned as coal lands but if they had been returned by the Surveyor General as coal lands, then that affirmative proof might have had some reference to these particular lands.

"A hearing such as I have heretofore mentioned in my testimony is considered under the rules and regulations as to the introduction by any parties interested in the subject matter of such evidence or proof ex parte or otherwise, oral or written as is required under the rules and regulations of the Department of the Interior. A day is set under the rules upon which proof may be submitted. As to State selections, and as to these particular cases, it was customary

to receive affidavits prior to the date set in the notice but they were notes as received as of the date set in the notice. That was peculiar to State selections only, but as to contest cases involving homestead entries or any other entries, nothing would be received or considered until the date set for the hearing. I could not state why that became peculiar to State selections except it might have been because of the fact that the State had no docket itself and as soon as they would receive the affidavits they would send them up to the land office and then the land office, not desiring to return them, would receive them and note them as filed as of the date set for the hearing. In each instance where affirmative proof was transmitted to the Commissioner of the General Land Office, I mean that those were affidavits signed by parties who stated in the affidavits that they were personally acquainted with the land and made the affidavits from personal knowledge. I have searched our records to ascertain if we have [fol. 497] any letters from the Commissioner of the General Land Office or from the Secretary of the Interior containing instructions in reference to the requirements to be demanded from the State of Utah as to a showing to accompany the filing of the selection lists, but I have found none other than the instructions that have already been put into the record. I have produced all instructions or rules or regulations given to the Local Land Office and its officers by the Commissioner of the General Land Office and the Secretary of the Interior in reference to what showing should be required by an applicant to enter coal lands. I know, as a matter of fact, however, that under the rules and regulations, special or general of the Commissioner of the General Land Office and the Secretary of the Interior, that the local land office were not permitted to receive coal declaratory statements upon any of the public lands other than those upon which an exposure of coal had actually been made. By referring to a coal declaratory statement it has always been necessary in order to gain a preference right and by virtue of coal declaratory statement to show a discovery of coal on the land in question. When I said, 'set the date' I had in mind the other kind of coal application, one based on Section, I think it is 2247. That is known as 'coal cash application,' not based upon a coal declaratory statement. We would not receive one of those filings or applications except upon affirmative proof by way of affidavit that

there had been an exposure of coal upon the particular land sought to be purchased. That was required to be shown in case a contest was brought. That there had been an actual discovery of coal upon the particular plat, that is my understanding to be the (criterion) upon which the character of the land was determined as being coal or non-coal between adverse claimants."

"Redirect examination.

By Mr. Maynard:

"I do not know any place in the rules or regulations of our office or any we received from Washington where a requirement was that the affirmative proof should consist of more than one ex parte affidavit except that in order to prove allegations in a contest there must be at least two witnesses. That was true in contest cases, ex parte or otherwise. The general rule was to require two affidavits in contest cases. I have in mind, though I do not know the particular case, where the State did file but one non-mineral affidavit and we required them to file another. I state that from memory because I had charge of these particular State selections ever since I have been in the office. It was our understanding that [fol. 498] the rules of Practice in contest cases required the additional affidavit.

"I am well acquainted with A. R. Talamantes. He lives in this vicinity and is a surveyor and a mining engineer.

"Recross-examination.

By Mr. Edwards:

"I said it was my recollection that Mr. Talamantes' name appeared on this map, Exhibit 45. It was from the map I say it was received in our office October 10, 1905. I made the notation myself. That appears from the endorsement. It was filed after Mr. Milner's death. (It was agreed that the record might show that Mr. Milner died May 2, 1906.)

"I would only use the term 'hearing' in a case where a notice was published, such as Exhibit 26, or such a case in which a notice issued and served personally upon the parties as in homestead and desert land entries, or where personal service could not be had, a notice was published. Would not consider anything else under the term 'hearing' except

in those three cases, and when I used the word 'hearing' it was in one of that class of cases."

"EDWARD D. DUNN, a witness produced by the complainant, heretofore duly sworn, being recalled, testified as follows:

"Direct examination.

By Mr. Maynard:

"Our records as to the land named and described in the bill of complaint in this case and which are subject to controversy herein, show that by Commissioner's letter 'N' of July 3, 1907, the lands involved in this suit were classified as follows:

"All the land in controversy in township 13 south of ranges 10 and 11 east were classified at $75.00 an acre; the S. E. 4 of section 27 and all of sections 33 and 34 and the S. 2 of section 35, township 12 south of range 11 east were classified at $50.00 per acre; the N. 2 of section 26, the N. E. 4 of section 27, and the N. W. 4 and the S. E. 4 of section 22, township 12 south of range 11 east were classified at $30.00 an acre. That is the present classification of those coal lands.

"By Mr. Edwards: At this point it is apparent from the answer of the witness at the present time that the classification he intends to testify in reference to was made subject to the transpiring of the events, the subject matter of this suit, and for that reason is incompetent, irrelevant and immaterial.'

[fol. 499] "Cross-examination.

By Mr. Edwards:

"None of these lands were classified prior to that time, that is the first classification that was ever placed upon them. Prior to that time no classification was placed upon the tract books. I have no recollection whether they have been returned by the Surveyor General as being mineral or non-mineral, coal or non-coal, so that I say no classification was ever made of these lands that was returned to the Land

Office until the year 1907, other than the return of the Surveyor General.

"I know of no change in the form of coal declaratory statement required by the Commissioner of the General Land Office, or the Secretary of the Interior having been made in the past ten years. I believe the circulars will show that there has been no difference as found in the circulars from 1907 to the present date. The circular that is used at the present time is a re-print of the circulars or coal land laws or regulations of July 31, 1882. That is true in so far as the form required for coal declaratory statements and applications for the purchase of the same.

"As to the application to purchase I refer to application to purchase coal lands for cash, but as a matter of fact the same form that is now used under the rules and regulations of the Department of the Interior has been used continuously for the past ten years, and I would say that there has not been any changes. I have never compared the form which is now used with the one in the circular but my understanding is that there is no (different) at all in that form.

"Having my attention called to the form on page 8 of 'coal land laws and regulations therein, General Land Office, July 31, 1882 (re-print extract from circulars of August 7, 1895, June 27, 1900 and January 5, 1904).'

"I think there has been a new circular or a re-print furnished the Local Land Office since 1904. I think that is under date of 1908 or 1907. The copy I now call attention to (Exhibit 66) remained in force and was the one by which the Local Land Office and its officers were guided until the time of the circular, which has just been mentioned, bearing date something like 1908.

"(At this point Mr. Edwards offered in evidence circular entitled 'Coal Land Law and Regulations therein, General Land Office, July 31, 1882, marked Exhibit 66,' and which is made a part of the cross-examination of the witness.)

[fol. 500] "The answer I last made is true in reference to the form upon application for cash purchase as well as coal declaratory statements.

"The circular, marked Exhibit 67, reading on the title page, as follows: 'Coal Land Laws and Regulations Therein (General Land Office, April 12, 1907) with amendments and supplemental circulars re-print July 11, 1908' requires the

same forms to be signed for coal declaratory statements as contained in pamphlet, Exhibit 66, and are the same that have been used ever since July, 1908 by the Local Land Office and the Department of the Interior.

"(Here Mr. Edwards offered in evidence the last named document, being marked Exhibit 67, as part of the cross-examination of the witness, and the same is made a part of the record.)

"Redirect examination.

By Mr. Maynard:

"The paper handed to me by Mr. Maynard is coal declaratory statement April 22, 1896, filed by Samuel M. Randolph, filed September 13, 1904 for the W. 2 of the S. W. 4 of section 10, and the N. 2 of the S. W. 4 of section 15, township 13 south of range 10 east, which is a part of the records of the United States Land Office at Salt Lake City, Utah. The record of the United States Land Office, Salt Lake City, shows as to the subsequent steps that have been taken under that, that on October 6, 1905 Samuel M. Randolph made a coal cash entry #203 for the land described in this coal declaratory statement, and that he paid $3,200.00 for the land, and a receiver's receipt issued #203. So far as the records of the United States Land Office of Salt Lake are concerned no patent has ever issued."

"Edward D. Dunn, a witness produced by the complainant, heretofore duly sworn, being recalled, further testified:

"Direct examination.

By Mr. Maynard:

"I have coal declaratory statement 1544, filed by Alvin Robbins, September 2, 1902, for the S. W. ¼ of Sec. 23, Tp. 16 S. of Range 7 E. with the Power of Attorney alleging possession in 1893, with the power of attorney from Alvin Robins to Don C. Robins and non-mineral affidavit by Don D. Robins.

"Mr. Edwards: I object to that on the ground that witness is merely reading off from a document and the instrument is the best evidence.

[fol. 501] "The coal declaratory statement expired. Also attached to this declaratory statement was an affidavit by John W. Lott and Geo. A. Robins, that coal declaratory statement expired by limitation. This land that was described in coal declaratory statement I have just read from appears again in coal declaratory statement 2147 filed Sept. 24, 1903 by Wm. B. Stanley which has a power of attorney from Wm. B. Stanley to Don C. Robins and a non-mineral affidavit by Don C. Robins, and also affidavits by John Lott and J. Fleming Wakefield which expired on Oct. 27, 1903.

"The next entry in the land office as to these lands was that on Nov. 24, 1905, Chas. M. Freed filed coal declaratory statement 2395 for the same tract of land with power of attorney from Chas. M. Freed to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by A. R. Talamantes and Geo. A. Robins.

"The next entry is on Jan. 16, 1906, Cas. M. Freed made coal cash entry No. 225 for the same tract of land.

"I have coal declaratory statement 2010 filed September 8, 1902 by Belle D. Robins. (It was here stipulated between counsels that all questions propounded to these witnesses and answers made thereto are objected to by defendants upon the ground that each and every one of them are incompetent, irrelevant and immaterial.) This coal declaratory statement is for the N. E. of the S. E. ¼ of Sec. 23, N. W. of S. W. ¼ and W. ½ of N. W. ¼ of Sec. 24, Tp. 15 S. of Range 7 E; and the power of attorney from Belle D. Robins to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by Geo. A. Robins and John W. Lott.

"I have coal declaratory statement 2117 filed by Jos. F. Ekman Sept. 10, 1903 for the same tract of land alleging possession on the 20th day of August, 1903, with power of attorney from Jos. Hickman to J. C. Brown and non-mineral affidavit by Don C. Robine and affidavits by John W. Lott and Jas. A. McKee.

"I have coal declaratory statement 2304 filed by Jos. Henshaw for the same tract of land Nov. 2, 1904, alleging possession on the 20th day of September, 1904 with power of attorney from Jos. Henshaw to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by Evans D. Edwards and Geo. Albright.

"I have coal declaratory statement 2400 filed by Herman A. Leitsiger for the same tract of land alleging possession

[fol. 502] on the 15th day of November, 1905, and power of attorney from Herman A. Leitsiger to Don C. Robins and a non-mineral affidavit by Don C. Robins and affidavits by A. R. Talamantes and Geo. A. Robins and on Jan. 16, 1906 Herman A. Leitsiger made coal cash entry 222 for the same tract of land.

"I have coal declaratory statement 1917 filed August 28, 1902 by John C. Knell alleging possession in 1893 of the E. ½ of N. W. ¼ and E. ½ of S. W. ¼ in Sec. 24, Tp. 16, S. of Range 7 E. and power of attorney from John C. Knell to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by John W. Lott and Geo. A. Robins.

"I have coal declaratory statement 2118 filed September 11, 1903 by Wm. H. Barnes for the same tract of land, alleging possession on the 20th day of July, 1903, and power of attorney from W. H. Barnes to Don C. Robins and non-mineral affidavit of Don C. Robins and affidavits by John W. Lott and Jas. A. McKee.

"I have coal declaratory statement 2299 filed October 3, 1904 by Daniel R. Page for the same tract of land, alleging possession on the 27th day of September, 1904 with power of attorney from Daniel R. Page to Don C. Robins and non-mineral affidavits by Don C. Robins and affidavits by Geo. A. Robins and Evans B. Edwards.

"I have coal declaratory statement 2327 filed Nov. 24, 1905 by Emma Leitsiger for the same tract of land, alleging possession on the 15th day of November, 1905 and power of attorney from applicant to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by A. R. Talamantes and Geo. A. Robins. On Jan. 16, 1906 Emma Leitsiger made coal cash entry 223 for the same tract of land.

"I have coal declaratory statement 1856 filed Aug. 27, 1902 by John W. Lott for the N. W. ¼ of Sec. 27, Tp. 16, S. of Range 7 E. alleging possession in 1893 and corroborating affidavits by George A. Robins and Jas. A. McKee.

"I have coal declaratory statement 2144 filed by William Burridge on Sept. 24, 1903 for the same tract of land alleging possession on the 12th day of August, 1903 and power of attorney from William Burridge to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by John W. Lott and J. Fleming Wakefield.

"I have coal declaratory statement 2323 filed November 28, 1904 by Lafayette A. Doles for the same tract of land,

alleging possession on the 10th day of October, 1904 and [fol. 503] power of attorney from Lafayette A. Doles to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by Geo. Albright and Evans D. Edwards. On Jan. 3, 1906 Brigham Y. Snyder filed coal cash entry 205 for same tract of land.

"I have coal declaratory statement 1844 filed August 25, 1902 by John S. Lott for the N. E. ¼ of Sec. 28, Tp. 16 S. possession on the 16th day of August, 1903 and power of attorney from John S. Lott to John W. Lott and non-mineral affidavit by John W. Lott and affidavits by Jas. A. McKee and James P. Lott.

"I have coal declaratory statement 2132 filed by Sarah A. Hancock on Sept. 14, 1903 for the same tract of land alleging possession on the 16th day of August, 1903 and power or attorney from her to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by John W. Lott and Jas. A. McKee.

"I have coal declaratory statement 2325 filed by Mabel Calkins on Nov. 29, 1904, for the same tract of land, alleging possession on the 29th day of September, 1904, and power of attorney from her to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by Evans D. Edwards and George Albright. On Jan. 16, 1906, Ernest Boman made a coal cash entry for the same tract of land.

"I have coal declaratory statement 1857 filed August 27, 1902, by Emma C. Lott for the S. W. ¼ of Sec. 22, Tp. 15, S. of Range 7 E., alleging possession in 1893 and power of attorney from her to John W. Lott and non-mineral affidavit by John W. Lott and affidavits by Jas. P. Lott and Jas. A. McKee.

"I have coal declaratory statement 2165 filed Oct. 1st, 1903, by Joy H. Johnson for the same tract of land, alleging possession the 31st day of July, 1903, and power of attorney from Joy H. Johnson to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by John W. Lott and J. Fleming Wakefield.

"I have coal declaratory statement 2315 filed Nov. 28, 1904, by Mortimer G. Taylor for the same tract of land, alleging possession on the 2nd day of October, 1904, and power of attorney from Mortimer G. Taylor to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by Evans D. Edwards and George Albright. On

[fol. 504] January 3, 1906, Rilla Snyder filed coal cash entry 204 for the same tract of land.

"I have coal declaratory statement 1763 filed by George A. Robins for the S. W. ¼ of N. E. ¼ of Sec. 22, the S. ½ of N. W. ¼ and N. E. of the N.W. ¼ of Sec. 23, Tp. 16 S. of Range 7 E. alleging possession in 1894.

"I have coal declaratory statement 2128 filed Sept. 14, 1903, by Archibald A. Kerr for the same tract of land, alleging possession on the 17th day of July, 1903, and power of attorney from Archibald A. Kerr to Don C. Robins and non-mineral affidavit by Don. C. Robins and affidavits by John W. Lott and Jas. A. McKee.

"I have also coal declaratory statement 2301 filed Oct. 3, 1904, by Margaret R. Kerr for the same tract of land, alleging possession the 24th day of September, 1904, and power of attorney from her to Don C. Robins and non-mineral affidavit by -on C. Robins and affidavits by George Albright and Evans D. Edwards.

"I have coal declaratory statement 2396 filed November 24, 1905, by Ruth Freed for the same tract of land, alleging possession on the 15th day of November, 1905, and power of attorney from her to -on C. Robins and non-mineral affidavit by Don C. Robins and affidavits by A. R. Talamantes and George A. Robins. On January 16, 1906, Ruth Freed made coal cash entry 214 for the same tract of land.

"I have coal declaratory statement 2016 filed Sept. 12, 1902, by Orson Robins for the N. ½ of S. W. ¼, Sec. 14, and E. ½ of S. E. ¼ Sec. 15, Tp. 16, S. of Range 7 E., alleging possession in 1893 and power of attorney from Orson Robins to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by George A. Robins and John W. Lott.

"I have coal declaratory statement 2115 filed Sept. 10, 1903, by Cora Ekman for the same tract of land alleging possession on the 20th day of August 1903, and power of attorney from the applicant to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by John W. Lott and Jas. A. McKee.

"I have coal declaratory statement 2399 filed by Ella C. Freed, November 24, 1905, for the E. ½ of S. W. ¼ Sec. 15, and N. ½ of S. W. ¼ Sec. 14, Tp. 16, S. of Range 7 E.

alleging possession on the 15th day of November, 1905, and [fol. 505] power of attorney from Ella C. Freed to Don C. Robins and non-mineral affidavit by Don C. Robins and affidavits by A. R. Talamantes and George A. Robins. On January 16, 1906, Ella C. Freed made coal cash entry 224 for the same tract of land.

"(Witness:) I have records in our office showing initiation of proceedings by the Register and Receiver, looking towards the cancellation of the Receiver's receipt to the parties who made the coal cash entries just referred to. I will read the substance of the notices which I refer to, which notices themselves are papers on file in the United States Land Office, and which are now before the Examiner. The step that has been taken looking towards the securing of a patent was the payment of the Government's price and the issuing of a Receiver's receipt. No patents in any of these cases have been issued, and therefore the matter is still within the jurisdiction of the Land Department.

"In the matter of coal cash entry 223, made by Emma Leitsiger, by Commissioner's letter 'P,' of March 9, 1910, proceedings were directed against that particular entry on the following grounds:

"1. That claimant did not make this entry for her own use and benefit, but for the benefit of another person or persons.

"2. That claimant entered into an agreement or understanding before entry, to the effect that the title which might be acquired from the United States, should inure to the benefit of some other person than herself. The letter is signed by Fred Dennett, Commissioner of the General Land Office, and is a part of the files in the local land office in Salt Lake City. The date has not been set by the local land office for the hearing. There were notices issued on March 3, 1910, and an answer has been filed by claimant, denying the charges, but no hearing can be had until so requested by the Chief of the Field Division, Mr. Hair.

"In the matter of coal cash entry 225, made by Charles M. Freed, by Commissioner's letter 'P,' of March 9, 1910, proceedings were directed against the entry on the following grounds:

"1. That prior to the making of the application to purchase lands embraced in this entry, claimant had made a careful examination of several thousand acres of valuable [fol. 506] coal lands of the United States, lying in and practically all in Emery County, in the State of Utah, and had determined to acquire possession of and title to, all of said lands.

"2. That, pursuant to his plan and purpose to acquire possession and title to said lands, claimant made use of what is commonly called the 'dummy' entry process; that is to say, he induced others to allow the use of their names as ostensible purchasers.

"3. That with claimant's knowledge said persons were induced to make entries of tracts of coal lands adjacent to the entry entered by claimant, with money furnished them for that purpose, and later in pursuance of a prior agreement or understanding, claimant has made cash payments not to exceed on the average $75.00 to each person, and received from them deeds conveying their interest in and to said lands to himself.

"4. That in pursuance of the claimant's plan to acquire said large tracts of coal land, he induced and persuaded several members of his family to enter coal lands adjacent to the lands entered by himself, with the understanding and agreement that while they might be entitled severally to the tracts entered by them, they were ultimately to be held for the joint benefit of all or equal shares. Letter signed by Fred Dennett, Commissioner of the General Land Office, being a part of the files of the local land office, Salt Lake City, Utah.

"On March 23, 1910, Eliza Freed, who claimed to be the testator and devisee of Charles M. Freed, filed an answer denying the charges in pursuance of notice; no hearing, however, has been had, and none will be set until so advised by the Chief of the Field Division.

"In the papers that I am now reading, the descriptions of the land are the same as the descriptions contained in the coal declaratory statements of the same parties.

"In the matter of coal cash entry 222, filed by Hayman A. Leitsiger, by Commissioner's letter 'P,' March 9, 1910, proceedings were directed against this entry on the following grounds:

"1. That claimant did not make this entry for his own use and benefit, but for the benefit of another person or persons.

[fol. 507] "2. That claimant entered into an agreement or understanding before entry, to the effect that the title which might be acquired from the United States should inure to the benefit of some other person than himself.

"Signed, Fred Dennett, Commissioner of the General Land Office, and is a part of the files and records of the Local Land Office in Salt Lake City.

"On March 23, 1910, as directed by said letter, a notice was issued to the claimant, and on April 13, 1910, an answer was filed by him denying the charges. No hearing has been set up to the present time, and no hearing will be set until a date has been named by the Chief of the Field Service.

"In the matter of coal cash entry 214, filed by Ruth M. Freed, by Commissioner's letter 'P,' March 9, 1910, proceedings were directed against said entry on the same charges as the last set forth. This letter is signed by Fred Dennett, Commissioner of the General Land Office, and is a part of the records of the Local Land Office in Salt Lake City. Notice to the claimant was issued, and an answer filed denying the charges, but no hearing has been set.

"In the matter of coal cash entry No. 224 filed by Ella C. Freed, by Commissioner's letter 'P,' March 9, 1910, proceedings were directed against said entry on the same grounds as above set forth. On March 23, 1910, claimant was notified and an answer was filed denying the charges, and no hearing has been set.

"In the matter of coal cash entry 204, made by Rilla Snyder, by Commissioner's letter 'P,' of March 9, 1910, proceedings were directed against said entry for the same reasons as above set forth in the other case. Claimant was notified, and also C. M. Freed, Assignee, but no answer has been filed up to the present time by either party.

"In the matter of coal cash entry 205, made by Brigham Y. Snyder, by the Commissioner's letter aforesaid, proceedings are directed against said entry on the same grounds, with the further charge that the Northwest ¼ of the Southwest ¼ of Section 27, Township 16, South of Range 7, embraced in said coal entry, is not valuable for

the coal contents therein. The claimant and C. M. Freed, Assignee, were notified, and no answers have been filed.

[fol. 508] "In the matter of coal cash entry 219, filed by Ernest Boman, by Commissioner's letter aforesaid, proceedings were directed against said entry on the same grounds as those heretofore set forth, and on the additional ground that the South ½ of the Northeast ¼ of Section 28, Township 16, South of Range 7 East, is not valuable for the coal contained therein. The claimant, and C. M. Freed, Assignee, were notified, but no answers have been filed."

"EDWARD D. DUNN, a witness produced by the defendant, heretofore duly sworn, being recalled, further testified:

"Direct examination.

By Mr. Edwards:

"My understanding of the meaning of the expression 'Mineral District' in the rules and regulations of the land Department and where mention is made or application to enter lands within mineral districts has reference to a particular township in which there are mineral claims of record in either the Surveyor General's office or in the Land Office. So that any township in which there is known to exist mineral land by that expression are classified as being 'within a mineral district.' Under the usage and custom of the Land Office, it is a fact that where our tract books fail to classify public lands as coal or mineral land that they are considered and recognized as having been classified as non-mineral or non-coal lands. I think my answer to the question, if that work 'tract book' were changed to 'plat,' it would be more correct.

"The plats are filed in the Land Office for the United States Surveyor General. That is done after they have been approved by the Commissioner of the General Land Office. By the practice in the Land Department a lack of affirmative notation upon the plats as to whether or not the lands contain coal or mineral is accepted as a classification of non-mineral or non-coal lands, except, if lands are not classified as coal and mineral lands, the entryman is required in all cases to submit a non-mineral affidavit. That,

however, is a matter of our practice. That rule was the rule during the time from 1900 to 1905, including the latter year.

"At all times between January 1900 and December 31, 1905, the official plat of survey on file in the United States Land Office in Salt Lake City, showed that all lands in township 12 south of range 11 east were returned by the [fol. 509] Surveyor General as agricultural; that all lands in section 3, township 13 south of range 11 east, were returned as agricultural; that all of sections 1 and 3, the N. ½ of section 10, 11 and 12 of township 13 south of range 10 east, were returned by the United States Surveyor General as agricultural; that the S. E. ¼ of section 12 and the E. ½ of the N. E. ¼ of section 14, township 13 south of range 10 east, were returned by the United States Surveyor General as coal lands. That covers all of these lands. When I say they were returned by the Surveyor General I mean those were the plats that were filed in our office by the Surveyor General after the platting had been done and submitted to the commissioner of the General Land Office and by him approved. That is what I understand the practice to be.

By Mr. Edwards: Now, is there any question on that practice, and if so, I will call the Surveyor General down here.

"Mr. Maynard: I don't think there is."

EXHIBIT 22

offered and read in evidence on the part of the plaintiff, is as follows:

(Exhibit 22—Page 882 to 933)

"B." 968. W. F. D.

United States Department of the Interior, General Land Office, Washington

March 20, 1929.

I hereby certify that the annexed copies of papers relating to Salt Lake City, Utah, selection list No. 52, Deaf and Dumb Asylum, are true and literal exemplifications of the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

D. K. Parrott, Acting Assistant Commissioner of the General Land Office. (Government Seal of the United States General Land Office.)

[fol. 510] Proof of Publication

State of Utah,
County of Iron, ss:

I, Joseph T. Wilkinson, being first duly sworn, depose and say that I am the Editor of the Iron County Record, a weekly newspaper of general circulation published every Friday at Cedar City, Utah: That the notice attached hereto, and which is a part of the proof No. 28 of Lands selected by the State of Utah, Lists No. 57 Reform School, No. 164 Reservoir, No. 52 Deaf and Dumb Asylum and No. 40 Institution for the Blind, was published in said newspaper for 9 consecutive issues, the first publication having been made on the 19th day of December, A. D. 1903, and the last on the 18th day of February, A. D. 1904; that said notice was published in the regular and entire issue of every number of the paper during the period and times of publication, and the same was published in the newspaper proper, and not in a supplement.

Joseph T. Wilkinson.

Subscribed and sworn to before me this 15th day of February, 1904. Jane S. Wilkinson, Notary Public.

Ex. 57

State Land Notice

United States Land Office, Salt Lake City

Dec. 7, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah has filed in this office lists of land selected by the said State under section 12 of the Act of Congress approved July 16, 1894.

The following tracts embraced in said list are in townships containing mineral claims of record, viz:

E. ½ N. W. ¼ W. ½ N. E. ¼ N. W. ¼ S. E. ¼ Sec. 14; W. ½ S. W. ¼ Sec. 15; E. ½ N. E. ¼ Sec. 21 and W. ¼ N. W. ¼ Sec. 22, Tp. 39 S. R. 11 W., embraced in List No. 57, Reform School.

E. ½ N. E. ¼ E. ½ S. E. ¼, Sec. 11, E. ½ N. E. ¼ Sec. 14, Tp. 38 S. R. 11 W. S. L. Mer., embraced in List No. 164 for the establishment of permanent water reservoirs for irrigating purposes.

N. W. ¼ S. W. ¼ Sec. 28, N. E. ¼ S. E. ¼ Sec. 27, [fol. 511] S. W. ¼ S. E. ¼ and E. ½ S. E. ¼ Sec. 34 Tp. 39 S. R. 9 W. S. L. Mer. embraced in List No. 52, for Deaf and Dumb Asylum.

S. W. ¼ S. W. ¼ Sec. 22; S. ½ S. E. ¼; N. W. ¼ S. E. ¼; S. ½ N. E. ¼; N. E. ¼ N. W. ¼ Sec. 26; N. ½; N. E. ¼ Sec. 35, Tp. 38 S. R. 11 W., Lots 1 and 2 Sec. 7, Tp. 36 S. R. 11 W. And N. W. ¼ S. E. ¼ Sec. 34, Tp. 35, South, Range 9 W. S. L. Mer., embraced in List No. 40, for the establishment and maintenance of an institution for the Blind.

Copies of said lists, so far as they relate to said tracts, by descriptive subdivisions, have been conspicuously posted in this office for inspection by any person interested, and by the public generally.

During the sixty days next following the date of this notice, under departmental instructions of November 27, 1896, (23 L. D., 459), protests of contests against the claim of the State to any of the tracts of subdivision hereinbefore described, on the ground that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C. Failure so to protest or contest within the time specified will be considered sufficient evidence of the non-mineral character of said tracts, and the selection thereof, being otherwise free from objection, will be recommended for approval.

Frank C. Hobbs, Register. Geo. A. Smith, Receiver.

(First Dec. 19—Last Feb. 18.)

Park City, Utah, Dec. 10, 1903. 09-2.

M State Board of Land Commissioners to The Park Record, Raddon & Raddon, Props., Dr.

Established 1880. Fine Job Printing

Oct. 10—To Pub. List No. 52—Lands for a Deaf and Dumb Asylum, as per proof of publication, 14.00.

Paid Dec. 10, 1903.

Raddon & Raddon, by T. C. S. (?). 09-3.

[fol. 512] Proof of Publication

STATE OF UTAH,
County of Summit, ss:

I, S. L. Raddon, being first duly sworn, depose and say that I am the Manager of the Park Record, a weekly newspaper of General circulation published every Saturday at Park City, Summit County, Utah; that the notice attached hereto, and which is a part of the proof No. List No. 52 of Lands selected for a Deaf and Dumb Asylum by the State was published in said newspaper for nine consecutive issues, the first publication having been made on the 10th day of October, 1903, 190, and the last on the 5th day of December, 1903, 190; that said notice was published in the regular and entire issue of every number of the paper during the period and times of publication, and that the same was published in the newspaper proper, and not in the supplement.

S. L. Raddon.

Subscribed and sworn to before me this 10th day of December, 1903, 190. Henry Shields, Notary Public.

Ex. 51

Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

The State of Utah having selected as a part of its grant for the establishment and maintenance of a deaf and dumb

asylum under the 12th section of the Act of Congress approved July 16, 1894, the following described tracts, returned by the United States Surveyor General as mineral land, notice is hereby given that the said State will submit proof as to the character of said land, before the Register and Receiver, at this office on Monday the 21st day of December, 1903, at 10:00 o'clock a. m., viz: N. E. ¼ N. W. ¼ section 20 and lot 4 section 21 township 3 south, range 4 east, S. L. M., Utah.

All persons claiming any portion of said described tracts as mineral lands, or desiring to protest or object to the selection thereof by the State, are hereby summoned to [fol. 513] appear on that date, and submit testimony in support of their claims or objections.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

Oct. 10—Dec. 5.

Invoice

Cedar City, Utah. 09-4.

State Board of Land Commissioners in Account with Wilkinson Brothers, Publishers of The Iron County Record

Chas. S. Wilkinson. J. T. Wilkinson, Jr.

All accounts mature at end of month.

Nov. 28.—To publishing State Land Notice, Lands selected for Deaf and Dumb Asylum 2¾ inches @ $4 per inch for entire period of publication, $11.00.

Received $11.00 in full of above account.

Iron County Record, per Joseph T. Wilkinson, Editor.

Proof of Publication

STATE OF UTAH,
County of Iron, ss:

I, Joseph Wilkinson, being first duly sworn, depose and say that I am the Editor of the Iron County Record, a weekly newspaper of general circulation published every Friday at Cedar City, Utah: That the notice attached here-

to, and which is a part of the proof No. 17 of Lands selected by the State of Utah for the establishment of a Deaf & Dumb Asylum, was published in said newspaper for 9 consecutive issues, the first publication having been made on the 3rd day of October, A. D. 1903, and the last on the 28th day of November, A. D. 1903; that said notice was published in the regular and entire issue of every number of the paper during the period and times of publication, and [fol. 514] the same was published in the newspaper proper, and not in a supplement.

Joseph T. Wilkinson.

Subscribed and sworn to before me this 1 day of December, 1903. E. H. Ryan, Notary Public.

State Land Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

The State of Utah having selected as a part of its grant for the establishment and maintenance of a Deaf and Dumb Asylum under the section of the Act of Congress approved July 16, 1894, the following described tracts, returned by the United States Surveyor-General as mineral land, notice is hereby given that the said state will submit proof as to the character of said land, before the Register and Receiver, at this office on Monday, the 21st day of December, 1903, at 10 o'clock a. m., viz:

N. W. ¼ S. W. ¼ Section 35, Township 39 South, Range 9 West, S. L. Mer.

All persons claiming any portion of said described tracts as mineral ??? lands, or desiring to protest or object to the selection thereof by the State are hereby summoned to appear on that date and submit testimony in support of their claims or objections.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

(First Oct. 3—Last Nov. 28.)

Affidavit of Publication

STATE OF UTAH,
County of Carbon, ss:

I, R. W. Crockett, being first duly sworn, depose and say I am the publisher of The Eastern Utah Advocate, a weekly newspaper of general circulation, published once a week at Price, Carbon County, Utah; that the notice hereto attached, and which is Deaf and Dumb Asylum was published in said newspaper for nine consecutive weeks, [fol. 515] the first publication having been made on the 8th day of October, 1903, and the last on the 10th day of December, 1903; that said notice was in the regular and entire issue of every number of the paper during the period and times of publication, and the same was published in the newspaper proper and not in a supplement.

R. W. Crockett.

Subscribed and sworn to before me this 17th day of December, 1903. A. M. Gray, (?) Notary Public. My commission expires Jan. 4, 1906. My commission expires ——, —, 19-.

Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah, having selected as a part of its grant for the establishment and maintenance of a Deaf and Dumb Asylum under the 12th section of the Act of Congress, approved July 16, 1894, the following described tracts, returned by the United States Surveyor-General as mineral land, notice is hereby given that the said state will submit proof as to the character of said land before the Register and Receiver at this office on Monday, the 21st day of December, 1903, at 10 o'clock a. m., viz:

S. E. ¼ of Section 11, S. E. ¼ Section 12, and E. ½ N. E. ¼ Section 14, Township 13 South Range 10 East, Lot 1, N. E. ¼ N. W. ¼, N. W. ¼ N. ½ S. E. ¼ S. E. ¼ S. E. ¼

Section 7, Township 13 South, Range 11 East, Salt Lake Meridian, Utah.

All persons claiming any portion of said described tracts as mineral land, or desiring to protest or object to the selection thereof by the State, are hereby summoned to appear on that date and submit testimony in support of their claims or objections.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

[fol. 516] (First Pub. Oct. 8—Last Dec. 9.)

Price, Utah, December 17, 1903.

Of. Land Commissioners—The Advocate Publishing Co., Dr.

Location Notices. Any Denomination in Stock. Printing. Stationery

To Deaf and Dumb Asylum Notice, 18.00.
52 D. & D. A. (?)
Received Payment.

R. W. Crockett, Manager.

Ex. 57

Notice

United States Land Office, Salt Lake City, Utah

September 25, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah having selected as a part of its grant for the establishment and maintenance of a Deaf and Dumb Asylum under the 12th section of the Act of Congress, approved July 16, 1894, the following described tracts, returned by the United States Surveyor-General as mineral land, notice is hereby given that the said State will submit proof as to the character of said land before the Register and Receiver at this office on Monday, the 21st day of December, 1903, at 10 o'clock a. m., viz:

S. E. ¼ of Section 11, S. E. ¼ Section 12 and E. ½ N. E. ¼ Section 14, Township 13 South, Range 10 East, Lot 1. N.

E. ¼ N. W. ¼ N. ¼ N. ¼ S. E. ¼ N. E. ¼ S. E. ¼ Section 7, Township 13 South, Range 11 East, Salt Lake Meridian, Utah.

All persons claiming any portion of said described tracts as mineral land, or desiring to protest or object to the selection thereof by the State, are hereby summoned to appear on that date, and submit testimony in support of their claims or objections.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

[fol. 517] (First Pub. Oct. 8—Last Dec. 9.)

Statement

Manti, Utah, Dec. 6, 1903. 09-10.

State Board of Land Commissioners, Salt Lake City, Utah,
in Account with The Manti Messenger

To publish 9 times, official notice lands selected by State, List, No. 52 for Deaf and Dumb Asylum, $12.30.
Paid in full.

N. P. Nelson, Publisher. 09-11.

Proof of Publication

State of Utah,
County of Sanpete, ss:

I, N. P. Nelson, being first duly sworn, depose and say that I am the Publisher of the Manti Messenger, a weekly newspaper of general circulation, published every Thursday at Manti, Utah; that the notice attached hereto and which is a part of the proof No. — of —— was published in said newspaper for 9 consecutive issues, the first publication having been made on the 8th day of October, A. D. 1903, and the last on the 3rd day of December, A. D. 1903; that said notice was published in the regular and entire issue of every number of the paper during the period and times of publication, and that the same was published in the newspaper proper, and not in a supplement.

N. P. Nelson.

Subscribed and sworn to before me this 10th day of December, 1903. Lewis Larisy, (1) Notary Public.

Ex. 59

Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah has filed in this office a list No. 52, of lands selected by the said [fol. 518] State for the establishment and maintenance of a Deaf and Dumb Asylum under Section 12 of the Act of Congress approved July 16, 1894. The following tracts embraced in said list are in a township containing mineral claims of record, viz:

Lot 2, Section 30, Township 16 South, Range 2 East, S. L. Mer. Utah.

A copy of said list, so far as it relates to said tracts by descriptive subdivisions, has been conspicuously posted in this office for inspection by any person interested, and by the public generally.

Within the next sixty days following the date of this notice, under departmental instructions of November 27, 1895, (23 L. D., 459), protests or contests against the claim of the State to any of the tracts or subdivisions hereinbefore described, on the ground that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C. Failure so to protest or contest within the time specified will be considered sufficient evidence of the non-mineral character of the tracts, and the selection thereof, being otherwise free from objection, will be recommended for approval.

Frank D. Hobbs, Register. George A. Smith, Receiver. 09-12.

Proof of Publication

State of Utah,
County of Garfield, ss:

I, E. S. Worthen, being first duly sworn, depose and say that I am the Publisher of the Progress, a newspaper of

general circulation, published every Thursday at Panguitch, Utah; that the notice attached hereto, and which is a part of proof No. 52 of Lands selected by the State for Deaf and Dumb Asylum, was published in said newspaper for 9 consecutive issues, the first publication having been made on the 8th day of October, A. D. 1903, and the last on the 3rd day of December, A. D. 1903; that said notice was pub- [fol. 519] lished in the regular and entire issue of every number of the paper during the period and times of publication, and that the notice was published in the newspaper proper, and not in a supplement.

E. S. Worthen, Publisher.

Subscribed and sworn to before me this 5th day of December, 1903. Geo. B. Hancock, County Clerk. 09-12, 09-13.

Proof of Publication

STATE OF UTAH,
County of Garfield, ss:

I, E. S. Worthen, being first duly sworn, depose and say that I am the Publisher of Progress, a newspaper of general circulation, published every Thursday at Panguitch, Utah; that the notice attached hereto, and which is a part of proof No. 52 of lands selected by the state for Deaf and Dumb Asylum, was published in said newspaper for 9 consecutive issues, the first on the 8th day of October, A. D. 1903, day of December, A. D., 1903; that said notice was— -tire issue of every number of the paper during the period —— (?) in the newspaper proper, and not —— (?)

E. S. Worthen, Publisher.

Subscribed and sworn to before this 5th day of -ember, 1903. Geo. B. Hancock, County Clerk.

Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah has filed in this office a list No. 52 of lands selected by the said State

for the Deaf and Dumb Asylum under section 12 of the Act of Congress approved July 16, 1894. The following tracts embraced in said list are in a township containing [fol. 520] mineral claims of record, viz: S. E. ¼ S. W. ¼ section 17, township 35 south, range 3 east, S. L. M.

A copy of said list, so far as it relates to said tracts by descriptive subdivisions, has been conspicuously posted in this office for inspection by any person interested and by the public generally.

Within the next sixty days following the date of this notice, under departmental instructions of November 27, 1896, (23 LD., 459), protests or contests against the claim of the State to any of the tracts or subdivision hereinbefore described, on the ground that the same is more valuable for mineral than for agricultural purposes will be received and noted for report to the General Land Office at Washington, D. C. Failure so to protest or contest within the time specified will be considered sufficient evidence of the non-mineral character of the tracts, and the selection thereof being otherwise free from objection, will be recommended for approval.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

Oct. 8—Dec. 3.

Panguitch, Utah, Dec. 5, 1903. 09-14.

State Board Land Commissioners to the Panguitch Progress, Dr.

Printing, Binding, and All Kinds of Engraving

To publishing inclosed notice 9 weeks, 10.00.
Paid.

E. S. Worthen, Publisher.

Ex. 57

Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah has filed in this office a list No. 52 of lands selected by the said State for the Deaf and Dumb Asylum under section 12 of the Act of Congress approved July 16, 1894. The following tracts embraced in said list are in a township containing mineral claims of record, viz: S. E. ¼ S. W. ¼ Section 17, township 35 south, range 3 east, S. L. M.

[fol. 521] A copy of said list, so far as it relates to said tracts by descriptive subdivisions, has been conspicuously posted in this office for inspection by any person interested, and by the public generally.

Within the next sixty days following the date of this notice, under departmental instruction of Nov. 27, 1896, (23 L/D 459), protests or contests against the claim of the State to any of the tracts or subdivisions hereinbefore described, on the ground that the same is more valuable for mineral than for agricultural purposes will be received and noted for report to the General Land Office at Washington, D. C. Failure so to protest or contest within the time specified will be considered sufficient evidence of the non-mineral character of the tracts, and the selection thereof being otherwise free from objection will be recommended for approval.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

09-15.

Oct. 8—Dec. 3.

3374. Exhibit 51. J/W C.

Non-mineral Affidavit

State of Utah,
County of Carbon, ss:

William Marland being duly sworn according to law, deposes and says, that he is well acquainted with the character

of the following described lands and with each and every legal subdivision thereof, viz: S. E. ¼ of Section 11, the S. E. ¼ of Section 12 and the E. ½ of the N. E. ¼ of Section 14, Tp. 13 S., R. 10 E., and Lot 1, the N. E. ¼ of the N. W. ¼, the N. E. ¼ the N. ½ of the N. E. ¼ and the S E. ¼ of the S. E. ¼ of Section 7, Tp. 13 S., R. 11 E., S. L. M., having frequently passed over the same.

That his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto That there is not to his knowledge within the limits thereof any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper or any deposit of coal; that there is not within the limits of said land to his knowledge any placer cement, gravel, gilsonite, elaterite, asphaltum or other valuable Mineral deposit.

That the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes [fol. 522] under the local customs or rules or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that this affidavit is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural and grazing purposes.

Wm. Marland.

Subscribed and sworn to before me at my office in Price, Carbon County, Utah, this 12th day of December, 1903. R. W. Crockett, Notary Public.

Ex. 51

Non-mineral Affidavit

State of Utah,
County of Carbon, ss:

Martin Anderson being duly sworn according to law, deposes and says, that he is well acquainted with the character of the following described land and with each and every legal subdivision thereof, viz: S. E. ¼ of Section 11, the S. E. ¼ of Section 12 and the E. ½ of the N. E. ¼ of

Section 14, Tp. 13 south, R. 10 east, and Lot 1, the N. E. ¼ of the N. W. ¼, the E. X. N. E. ¼, the N. ½ of the S. E. ¼ and the S. E. ¼ of the S. E. ¼ of Section 7, Tp. 13 S., R. 11 E., S. L. M., having frequently passed over the same.

That his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto. That there is not to his knowledge within the limits thereof any vein or lode of Quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge any placer cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit.

That the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that this affidavit is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural and grazing purposes.

Martin Anderson.

[fol. 523] Subscribed and sworn to before me at my office in Price, Carbon County, Utah, this 7th day of December, 1903. R. W. Crockett, Notary Public. 09-17.

Ex. 51

Non-mineral Affidavit

State of Utah,
County of Carbon, ss:

Wm. B. Haycock, being duly sworn according to law, deposes and says, that he is well acquainted with the character of the following described land and with each and every legal subdivision thereof, viz: S. E. ¼ of Section 11, the S. E. ¼ of Section 12, and the E. ½ of the N. E. ¼ of Section 14, Tp. 13, S., R. 10 E., and Lot 1, the N. E. ¼ of the N. W. ¼, the N. E. ¼, the N. ½ of the S. E. ¼ and

the S. E. ¼ of the S. E. ¼ of Section 7, Tp. 13 So., R. 11 E., S. L. M., having frequently passed over the same.

That his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto. That there is not to his knowledge within the limits thereof any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge any placer cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit.

That the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that this affidavit is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural and grazing purposes.

Wm. B. Haycock.

Subscribed and sworn to before me at my office in Price, Carbon County, Utah, this 11th day of December, 1903. R. W. Crockett, Notary Public.

[fol. 524] Ex. 51

Non-mineral Affidavit.

STATE OF UTAH,
County of Carbon, ss:

John Draper being duly sworn according to law, deposes and says, that he is well acquainted with the character of the following described land and with each and every legal subdivision thereof, viz: S. E. ¼ of Section 11, the S. E. ¼ of Section 12, and the E. ½ of the N. E. ¼ of Section 14, Tp. 13 S., R. 10 E., and Lot 1, the N. E. ¼ of the N. W. ¼, the N. E. ¼, the N. ½ of the S. E. ¼ and the S. E. ¼ of the S. E. ¼ of Section 7, Tp. 13 S., R. 11 E., S. L. M., having frequently passed over the same.

That his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto.

That there is not to his knowledge within the limits thereof any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to his knowledge any placer cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit.

That the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that this affidavit is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural and grazing purposes.

John Draper.

Subscribed and sworn to before me at my office in Price, Carbon County, Utah, this 12th day of December, 1903. R. W. Crockett, Notary Public. 09-19, 09-19.

Ex. 57

Non-mineral Affidavit

STATE OF UTAH,
County of Carbon, ss:

Thomas Haycock being duly sworn according to law, deposes and says, that he is well acquainted with the char- [fol. 525] acter of the following described land and with each and every legal subdivision thereof, viz: S. E. ¼ of Section 11, the S. E. ¼ of Section 12, and the E. ½ of the N. E. ¼ of Section 14, Tp. 13 S., R. 10 E., and Lot 1, the N. E. ¼ of the N. W. ¼, the N. E. ¼, the N. ½ of the S. E. ¼ and the S. E. ¼ of the S. E. ¼ of Section 7, Tp. 13 S., R. 11 E., S. L. M., having frequently passed over the same.

That his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto. That there is not to his knowledge within the limits thereof any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of

coal; that there is not within the limits of said land to his knowledge any placer cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit.

That the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that this affidavit is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural and grazing purposes.

Thomas (his X mark) Haycock.

Witness to mark or signature: Alfred Perkins.

Subscribed and sworn to before me at my office in Price, Carbon County, Utah, this 11th day of December, 1903. R. W. Crockett, Notary Public. 09-20, 09-20.

Ex. 57

Non-mineral Affidavit

State of Utah,
County of Carbon, ss:

M. C. Wilson being duly sworn according to law, deposes and says, that he is well acquainted with the character of the following described land and with each and every legal subdivision thereof, viz: S. E. ¼ of Section 11, the S. E. ¼ of Section 12, and the E. ½ of the N. E. ¼ of Section 14, [fol. 526] Tp. 13 S., R. 10 E., and Lot 1, the N. E. ¼ of the N. W. ¼, the N. E. ¼, the N. ½ of the S. E. ¼ and the S. E. ¼ of the S. E. ¼ of Section 7, Tp. 13 S., R. 11 E., S. L. M., having frequently passed over the same.

That his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto. That there is not to his knowledge within the limits thereof any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land to

his knowledge any placer cement, gravel, gilsonite, elaterite, asphaltum or other valuable mineral deposit.

That the land contains no salt springs or deposits of salt in any form sufficient to render it valuable therefor; that no portion of said land is claimed for mining purposes under the local customs or rules or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that this affidavit is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural and grazing purposes.

M. C. Wilson.

Subscribed and sworn to before me at my office in Price, Carbon County, Utah, this 7th day of December, 1903. R. W. Crockett, Notary Public.

Non-mineral Affidavit

United States Land Office, Salt Lake City, Utah

Kanab, November 3, 1903.

H. W. Esplin, being duly sworn according to law, deposes and says that he is personally acquainted with Chas. Lungreen who is an applicant for Government title to the N. W. ¼ of the S. W. ¼ of Sec. 35, Tp. 39 S., R. 9 W., Salt Lake Meridian, that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposits of coal; that there is not within the limits [fol. 527] of said land, to his knowledge, any placer cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not

made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, and that his post-office address is Orderville, Kane County, Utah.

H. W. Esplin.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Kanab within the Salt Lake land district, on this 3rd day of November, 1903.

J. D. Spencer, Clerk of the District Court in and for Kane County, Utah. 09-22.

Non-mineral Affidavit

United States Land Office, Salt Lake City, Utah

Kanab, November 3, 1903.

Charles Lundgreen, being duly sworn according to law, deposes and says that he is the identical Charles Lundgreen who is an applicant for Government title to the N. W. ¼ of the S. W. ¼ of Sec. 35, Tp. 39 S., R. 9 W., Salt Lake Meridian, that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposits of coal; that there is not within the limits of said land, to his knowledge, any placer cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners [fol. 528] or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land,

but with the object of securing said land for agricultural purposes, and that his post-office address is Kanab, Kane County, Utah.

Chas. Lundgreen.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Kanab within the Salt Lake land district, on this 3rd day of November, 1903.

J. G. Spencer, Clerk of the District Court in and for Kane County, Utah. 09-23.

Non-mineral Affidavit

United States Land Office, Salt Lake City, Utah

Kanab, November 3, 1903.

Thomas Barnard Tait, being duly sworn according to law, deposes and says that he is personally acquainted with Chas. Lundgreen who is an applicant for Government title to the N. W. ¼ of the S. W. ¼ of Sec. 35, Tp. 39 S., R. 9 W., Salt Lake Meridian, that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that his application therefor is not [fol. 529] made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said

land for agricultural purposes, and that his post-office address is Mt. Carmel, Kane County, Utah.

Thomas B. Tait.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by H. S. Cutler), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Kanab within the Salt Lake land district, on this 3rd day of November, 1903.

J. G. Spencer, Clerk of the District Court in and for Kane County, Utah. 09-24.

—062

Non-mineral Affidavit

This affidavit can be sworn to only on personal knowledge, and can not be made on information and belief.

The non-mineral Affidavit accompanying an entry of public land must be made by the party making the entry, and only before the officer taking the other affidavits required of the entryman.

STATE OF UTAH,
County of Salt Lake, ss:

Department of the Interior, United States Land Office,
Salt Lake City, Utah

Nov. 7, 1903.

Maurice Epperson, Cornelius A. Springer, Elliott B. Springer, being duly sworn according to law, depose and say that they are well acquainted with the N. E. ¼ N. W. ¼, Sec. 20 and Lot 4, of Sec. 21, Tp. 3 S. R. 4 E. S. L. M., that they are well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that their personal knowledge of said land is such as to enable them to testify understandingly with regard thereto; that there is not, to their knowledge, within the limits thereof, any

vein or lode of quartz or other rock in place, bearing gold, [fol. 530] silver, cinnabar, lead, tin, or copper, bearing mineral of value or any deposit of coal; that there is not within the limits of said land, to their knowledge, any placer, cement, gravel, or other valuable mineral deposit; that the land contains no salt spring, or deposits of salt in any form sufficient to render it chiefly valuable therefor; that no portion of said land is claimed with mineral of value for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral other than prospecting during any part of the year by any person or persons; that said land is essentially non-mineral land, and that application therefor is not made for the purpose of fraudulently obtaining title to the mineral land, but with the object of securing said land for agricultural purposes, and that their post office address is Midway, Utah, and Salt Lake City, Utah.

Maurice Epperson, Cornelius A. Springer, Elliot B. Springer.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——), and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in Salt Lake City, within the Utah land district, on this 7th day of November, 1903.

L. N. Gary, Notary Public.

NOTE.—The officer before whom the deposition is taken should call attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Revised Statutes of the United States

Title LXX—Crimes

Chapter 4

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in

which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any [fol. 531] material matter which he does not believe to be true, is guilty of perjury, and shall be punished by fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See Sec. 1750).

Ex. 51. JWC. Ex. 57

4-228

Certificate as to Posting of Notices

Department of the Interior, United States Land Office, Salt Lake City, Utah

Feb. 25, 1903. 0-4. 09-25.

I, Frank D. Hobbs, Register, do hereby certify that a notice, a copy of which is hereto attached, was by me posted in a conspicuous place in my office on the 25th day of September, 1903, and remained posted during the period of publication of said notice.

Frank D. Hobbs, Register.

Invoice

Cedar City, Utah, Dec. 1st, 1903. 09-26.

State Board of Land Commissioners in Account with Wilkinson Brothers, Publishers of The Iron County Record

Chas. E. Wilkinson. J. T. Wilkinson, Jr.

All accounts mature at end of month.

Nov. 28.—To publishing State Land Notice List No. 52 Deaf & Dumb Asylum 3¾ inches @ $4 per inch entire period of publication, 15.00.

Received $15 in full of above account.

Iron County Record, per Joseph T. Wilkinson.

[fol. 532] Ex. 57. 09-27

Proof of Publication

STATE OF UTAH,
County of Iron, ss:

I, Joseph T. Wilkinson being first duly sworn, depose and say that I am the Editor of the Iron County Record, a weekly newspaper of general circulation published every Friday at Cedar City, Utah; that the notice attached hereto, and which is a part of the proof No. 18 of List No. 52, lands for Deaf and Dumb Asylum was published in said newspaper for 9 consecutive issues, the first publication having been made on the 3rd day of October, A. D. 1903, and the last on the 28th day of November A. D. 1903; that said notice was published in the regular and entire issue of every number of the paper during the period and times of publication, and the same was published in the newspaper proper, and not in a supplement.

Joseph T. Wilkinson.

Subscribed and sworn to before me this 1st day of December, 1903. E. H. Ryan, Notary Public.

State Land Notice

United States Land Office, Salt Lake City, Utah

Sept. 25, 1903.

To whom it may concern:

Notice is hereby given that the State of Utah has filed in this office, a list No. 52, of lands selected by said state for the establishment and maintenance of a Deaf and Dumb Asylum, under Section 12 of the act of Congress approved July 16, 1894. The following tracts embraced in said lists are in a township containing mineral claims of record, viz:

N. W. ¼ S. W. ¼ Section 26; N. E. ¼ S. E. ¼, Section 27, S. W. ¼ S. E. ¼ and E. ½ S. E. ¼ Section 34, Township 36 south, Range 9 west and N. E. ¼ S. E. ¼ Section 25, township 37 south, range 10 west, and Lot 5, Section 1, Township 38 south, Range 10 west, S. L. Mer.

A copy of said list, so far as it relates to said tracts by descriptive subdivisions, has been conspicuously posted in

this office for inspection by any person interested, and the public generally.

Within the next sixty days following the date of this notice, under departmental instructions of November 27, 1895, [fol. 533] (23 L. D., 459), protests or contests against the claim of the State to any of the tracts or subdivisions hereinbefore described on the ground that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the General Land Office at Washington, D. C. Failure so to protest or contest within the time specified will be considered sufficient evidence of the non-mineral character of the said tracts, and the selection thereof, being otherwise free from objection, will be recommended for approval.

Frank D. Hobbs, Register. Geo. A. Smith, Receiver.

(First Oct. 3—Last Nov. 28.)

Invoice

Cedar City, Utah, Feb. 15th, 1904. 09-28.

State Board of Land Commissioners in Account with The Iron County Record, Charles S. Wilkinson, Publisher

All accounts mature at end of month.

Feb. 13.—To publishing State Land Notice, being parts of Lists 57, Reform School, 164 Reservoir, 52 Deaf and Dumb Asylum, and 40 Institution for the Blind, 5¼ inches, @ $4 per inch entire period of publication, 21.00.

Received $21.00 in full of above account.

Iron County Record, per Joseph T. Wilkinson.

Ex. 57.

ELI TAYLOR, a witness produced by the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Lacy:

The following is from the notes that I made as to the approval of the various lists submitted and the selection of

lands by the State of Utah. This relates alone to those lands that are involved in this action.

The southeast quarter of section 12, township 13 south 10 east, the east half of the northwest quarter of section 14, township 13 south, range 10 east, the northeast quarter, the northwest quarter of section 7, the northeast quarter the north half of the southeast quarter, the southeast quarter of [fol. 534] the southeast quarter of section 10, township 13 south, range 11 east, included in State selection list 52, Exhibit No. 3 was recommended for approval by the Commissioner of the General Land Office, November 25, 1904, and was approved by the Secretary of the Interior December 1, 1904, which is shown by approved list No. 10 deaf and dumb asylum.

The north half of section 26, town 12 south, range 11 east, the south half of section 26, the north half of section 35, township 12 south, range 11 east, included in Utah State list No. 67, Agricultural College, Exhibit No. 4 was recommended by the Commissioner of the General Land Office for approval December 21, 1901, and was approved by the Secretary of the Interior December 23, 1901, as shown by approved list No. 16 Agricultural College.

The north half of section 33, township 12 south, range 11 east and Lots 1, 2 and 3, the southeast quarter of the southeast quarter of section 3, township 13 south, range 11 east, included in Utah State list No. 71 Agricultural College, Exhibit No. 5 was recommended for approval by the Commissioner of the General Land Office, June 30, 1903, and was approved by the Secretary of the Interior July 9, 1903, which is shown by approved list No. 8, Utah Agricultural College.

All of Section 1, township 13 south, range 10 east and all of section 3 of the north half of section 10 and the north half of section 11 and the north half of section 12 and in the same township and range was included in the Utah State list No. 75, Agricultural College, Exhibit 6.

This land was recommended for approval by the Commissioner of the General Land Office May 4, 1904, and was approved by the Secretary of the Interior May 9, 1904, as shown by the approved list No. 9 Agricultural College.

All of section 34 of the south half of section 33, the south half of section 35, the east half of section 29, the southeast quarter and the northwest quarter of section 22, township

12 south, range 11 east, included in Utah State list No. 32, School of Mines, Exhibit No. 7, was certified by approval by the Commissioner of the General Land Office June 15, 1901, was approved by the Secretary of the Interior June 22, 1901, as shown by approved list No. 5, School of Mines.

That list includes all of the lands that was furnished me. I was given the list of lands and I have given the status of those lands.

[fol. 535] Cross-examination.

By Mr. Wilson:

The southeast quarter of section 11, township 13 south, range 10 east, was included in the early list but it was not approved in the earlier list. It was approved in 1915 and the coal reserved to the United States. Yes sir, I have got a certification of section 13 in township 13 south, range 10 east. That was approved by the Secretary of the Interior May 9, 1904. It was certified by the Commissioner of the General Land Office and recommended for approval to the Secretary of the Interior May 4, and the list approved by the Secretary May 9, 1904. When I say secretary, I mean Secretary of the Interior of the United States. The north half of section 10 in township 13 south, range 10 east, was approved the same date in the same list as was the northwest quarter of section 11 in township 13 south, range 10 east.

Cross-examination.

By Mr. King:

The north half of section 26 and the southeast quarter and the northwest quarter of section 22 and the east half of section 27, all of section 34, the south half of section 35, all of section 33, township 12 south, range 11 east, were approved in different lists. These lands covered by these descriptions were all selected by the State and the selected list approved as far back as 1904. All of section 1, all of section 3, the north half of section 10, the north half of section 11, the north half of the southeast quarter of 12, the east half of the northeast quarter of section 14, all in township 13 south, range 10 east, were selected and approved as early as 1904. The same is true of Lot 1, the northeast quarter of

the northwest quarter, the northeast quarter, the north half of the southeast quarter, the southeast quarter of the southeast quarter of section 7, lots 1, 2 and 3, the southeast quarter of the southeast quarter of section 3, township 13 south, range 11 east, Salt Lake Meridian. They were all approved as early as 1904.

Recross-examination.

By Mr. Wilson:

I am register of the United State Land Office at Salt Lake City, and have been in that position five years. Yes sir, I am familiar with the method in which lands are selected under what is known as the grant of the Enabling Act of this state. There are certain grants contained in the Enabling Act which are grants of school lands absolutely. Then there are other grants sometimes referred to as floating grants. Where the state goes out and selects lands to the extent of so many hundred thousand acres or so many thousand acres [fol. 536] for the purpose of a blind asylum or of a miners' hospital—yes sir, I am familiar with those. The practice is that whenever the State makes a selection under those Enabling grants—it has been the practice here for many years—so far as the Land Office records show to apply to the Government officers and that is taken up and recommended as testified a while ago by the General Land Office and finally goes to the Secretary of the Interior and he approves it and this land is certified. That describes it generally. That is when we describe it as approved. There is an approved list filed. I suppose that approved list would be a certification. Yes sir, that constitutes the list as I understand it. There is no patent issued in that kind of a case. There is a copy of that list delivered to the State of Utah and one kept and retained in the General Land Office and a copy sent to our office for our own use, for the files. The certifications that I brought in here today are in our regular files. We have special files for this list. It is called the State Selection file. In our office we have what is called two sets of records. We have the official township plats and we have what we call a tract book, and when a selected list is originally filed by the State that selection list is noted both on the tract book and the plat book of our office, and when the list is approved by the Secretary of the Interior and again transmitted to our office approved, we note that fact on our records. The

list number is noted on the plat. That is the number of the approved list and the same is noted on our tract-books describing that list. Take for instance section 3 in township 13 south, range 10 east, which has been selected and there is an approval shown by the records in our office. Section 3 is charged against the Agricultural College Grant. In other words in section 13 of the Enabling Act there was a grant of so many thousand acres for the purpose of an Agricultural College. In section 12 we have a grant of so many thousand acres for various specific purposes and in that grant Section 3 was charged against the Agricultural College grant. That would mean to the extent of 640 acres, the ground contained in the Enabling Act was satisfied. The northwest quarter and the north half of section 10 in township 13 south, range 10, is charged against the Agricultural College. The northwest quarter of section 11 in township 13 south, range 10 east is charged against the Agricultural College, and that shows in the record of my office. The grant made by the Government in the Enabling Act is satisfied to that extent so far as the records of my office are concerned. It never has been the custom to issue a patent upon these lands. No patent has ever been issued. The approved selection is the source of the title.

[fol. 537] Whenever lands are classified by the geological survey those classifications are transmitted to our office and made a part of our records. I wouldn't say that we have classifications of lands generally in the records of the office, but more specifically as they are classified and declared coal or non-coal or otherwise the department sends us copies of those classifications and they are made a part of our records. Yes sir, I have some classification as to land in my office. Yes sir, there is a showing on the records in my office that these lands involved in those certificates involved in this suit were classified. I have nothing to show how these lands are clasified. That is the original classification. The only thing is this, the record offered in evidence shows opposite the various tracts of land what our records show at the dates these were filed and in a number of cases you will note if you will refer to the various original files, the original filing by the state there has been noted on the margin the term mineral or mineral return or coal return or coal. Those memorandums would be from those records that have been furnished us, yes sir. I don't

know whether or not there were any classifications of these lands prior to the approval of these lists. I will ascertain as to that and let you know about it.

Cross-examination.

By Mr. King:

Yes sir, the same statements that I made in reply to Mr. Wilson with respect to the lands referred to would apply also to the balance of the lands that are involved in this controversy. That is if they were selected and thereafter approved and charged as against the land grants for the asylum and the Agricultural College on some of the appropriate plats. Yes sir, the records in my office will now show that all of the other lands, making a total there of over 5500 acres involved in this suit were all selected, the selections approved in my office and charged against these respective land grants.

The Court:

Q. Who made the designation, as to what grants it covers?

A. The State makes the designation as to what grants it covers. The list shows the grant against which it is charged and the State makes its own selection, and after the State has satisfied all the grants for one selection, it may turn to another or it may just satisfy those grants, as the demands of that particular grant call for money.

In any event as to all of these lands after application was made the selections were properly certified to the General [fol. 538] Land Office at Washington and thereafter were approved by the Secretary of the Interior and copies returned back to my office. Yes, sir, the record is in my office with respect to all of this land that is involved. If they are selected and are approved and regularly and properly certified, these approvals come to my office for my file there. There are township plats of all of the land involved in this action in my office, yes sir. No sir, there was not any designation by a cross or a circle on those township plats showing which, for instance, were mineral and which were not mineral. No sir, the map in my office does not show a particular designation with respect to the classification of the

lands, not on the plats themselves. Such land is designated separately and a plat might be attached or a classification might be noted on the marginal end of the plat, but nothing on the face of the plat or on the land itself. When a piece of land for instance is named whether the entry is listed or selected as a coal entry or whether it is taken as a mineral entry, there is a notation there on the plat itself. These lands were all platted and noted on the original plats in my office. The plats themselves, Mr. King, do not show whether the land is mineral or non-mineral because of the fact that no classification was ever made as to the land, for instance as to its metallic or mineral contents. We sometimes classify lands as to coal, whether it may be valuable for petroleum or nitrogen or some of the others, whereby we might definitely classify the lands, but we don't say it is mineral or non-mineral; those classifications, Mr. King, when they are made are never noted on the plats. Yes sir, those classifications are made by the geological department connected with the Interior Department. When they do classify, in some cases the classification is sent to my office officially, but not always. I don't know without looking up the original record whether that was done with respect to these lands before the entry was actually made.

Recross-examination.

By Mr. Wilson:

Classifications are only kept by our office as those classifications may be transmitted to us from the General Land Office. It is part of the duties of the office to make a part of the record any classifications that were transmitted and we note them on the records both the tract and plat books. Whenever classifications have been made and transmitted to us, it is part of our duty to make a record of the classification. I regard it as an official record to that extent. Yes sir, I understand on my examination referring to these grants that they are all contained in what we call the Enabling Act, which is an Act of Congress dated July 16, 1894. Yes sir, I will make an examination of the records of my [fol. 539] office to determine what if any classification of this land have been transmitted to my office and when transmitted and show the dates of the classifications and what the classifications were with reference to the lands in con-

troversy, prior to these certifications. My recollection is that no classifications were actually made until 1906.

Re-examination by Mr. Lacy:

When a selection is made by the state under one of the grants of the Enabling Act and proof charged against the state, if that selection fails and is disallowed or disapproved, it is again cancelled on our records. In a case of that kind when our office would be advised of that fact and the selected list cancelled, our record would again be noted that the selection list had been cancelled. That is the manner of keeping our records with reference to that.

Recross-examination.

By Mr. King:

As to these 5,500 acres involved, our records still show that the certification has been made to the State of Utah and show no cancellation.

Recross-examination.

By Mr. Wilson:

I am familiar with the fact that certain instructions are given generally to surveyors who make the certifications of these lands with reference to observing or aiding in classification of the land. I don't know except by hearsay whether a man sent out from the Surveyor General's office to survey lands and plat them into townships is supposed to make observations as he makes the survey and return those observations with proper notations as to whether the land is coal land or level land or mineral land. Information that comes in that way from the surveyors comes to my attention only as it is noted on the plats that are made by the Surveyor General's office and now in the public survey and made a part of the records in our office insofar as the memorandum was made on the official plats. In some instances with some plats there are notations made in regard to certain lands included in this controversy. There are in some cases notations showing that the land is metaliferous land or mineral land. I haven't any knowledge as to what is shown in regard to the land involved in this suit. I will look up that information and bring it back. I don't know

what the record will show until I look at the plat and tract books, but if you want the original list transmitted with these classifications, it would take some time to look it up, because they are in old files.

[fol. 540]. The Court: What he wants, as I understand it is whether or not on your plats or in any other records there is a notation to the effect that this land was agricultural land or coal land or whatever the notation may be.

ELI TAYLOR recalled.

Examination by Mr. Wilson:

Since I left the stand I have made a search of my records. With reference to the question you asked me about the classification of land, I found that with respect to 12 south, township 12 south, range 11 east, there was no memorandum of any kind on the township plat showing the character of the land, and as to township 13 south, range 10, there is this notation on the margin of the plat, as it was received by us from the Surveyor General: "Sections retained as coal lands, Sections 5, 7, 8 the south half of Sections 9, 10, 11, 12, the north half of Sections 14, 15, 16, 17 and 18." I didn't get the date of when that was made, but it was at the time when the plat or survey was made, which was filed in 1890 I would say. The north half of section 10 was not classified. There was no notation indicating its character. There was no notation as to section 3 or the northwest quarter of section 11. There was nothing there to indicate that it was mineral. The absence of a notation does not mean very much except this, whenever an application is made with respect to the mineral character of the lands it is a matter for our office to investigate when an application is made for that land. A return made is not necesasrily authentic, so that in each case when there might be such a notation as to the character of the land, the applicant would be called upon to make a showing to disprove the statement made or the return made by the surveyor. He may have surveyed the lands in the field. If you take section 3 in township 13, range 10 east, on which there is no notation, not finding any notation, you would not require the applicant to make any showing unless you had some other information. No sir, not anything except the non-mineral

affidavit. If the surveyor returned it without making a notation as to its mineral character, it would indicate at least that the surveyor didn't pass on it. There was nothing there to lead him to make a return. Assuming that he had instructions to return any outcrop of mineral or coal that he found on each quarter section and not having returned it, I would say that so far as he was concerned it was non-mineral.

My records show no return of section 1 or of the north half of section 12 in township 13 south, range 10 east. That is correct. There was nothing on the plat of sections 33, [fol. 541] 34 and 35 in township 12 south, range 11 east, relative to the lands being mineral or otherwise. As to whether any part or portion of the land in controversy in this litigation was returned upon the plat as mineral land, I don't know. I think you have got some lands in sections 14 and 15 somewhere along there that have been. I told you all that was shown there as to the land in township 13 south and 11 east. There may be some in 13 south. There is a plat in that case which shows a return as coal land, sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, in 11 east and 13 south. Section 7 is not mentioned.

Mr. Lacy: You don't consider this memoranda made on the plat as in any way a classification as to its mineral character?

A. It is never considered as a classification by us.

J. C. Dick, offered and sworn as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Wilson:

I am a resident of Salt Lake City and have lived here for 27 years. I am a civil engineer by occupation. As to my experience in making Government surveys, I have had one Government contract, several Government contracts, but one Government contract that had to do with the coal lands in Huntington Canyon. That was in 1900 or thereabouts. Yes sir, I am familiar with the duties of a surveyor acting for the Government, making reports on Government

tracts. I think I remember the instructions I was given at that time. Those instructions emanated from the Surveyor-General's office of the United States. All surveyors have the same instructions in this intermountain country. We were instructed to report all lands as coal lands upon which coal outcropped only. I tried to carry out those instructions. That was the general practice among the persons surveying for the Government. It was returned to the Surveyor-General's office in connection with my field notes for record, and they were made and filed here in the General Land Office. When I made the survey I returned my report immediately to the Surveyor General's office. From there it went to the Land Office. I made maps and plats of the land and divided it up into townships and sections. I had two different contracts with the Government, which is all the experience I had making Government sur-
[fol. 542] veys. The Huntington Canyon survey took 3 or 4 or 5 months, and in the reservation it took part of two years.

Cross-examination.

By Mr. Lacy:

I reported as coal lands all lands upon which a coal outcrop appeared. Where there was a quarter section of 40 acres, a subdivision upon which no coal appeared, it was not reported as coal land. In other words, unless there was an outcrop on each forty-acre tract, I didn't report that particular tract as coal land. We were not asked to put that in the classification as non-coal land. If I remember right we reported coal land on the quarter sections upon which the coal appeared. We didn't consider the sections as coal land. I believe I might distinguish. I don't think we considered the entire section as coal land because coal might outcrop on the northeast quarter for instance and not a sign of it on the southeast quarter. I am certain it was not the forty-acre tracts. It was a quarter section, which is the smallest subdivision in my survey. I think we reported it in the quarter section in which it appeared.

Cross-examination.

By Mr. King:

If I didn't find any coal outcropping, I would report it as grazing land, or agricultural land, whatever it was. The

description of the township follows the Government résumé of the description of the land as to whether it was agricultural land or good grazing lands or timber land. These tracts that I spoke of were tracts that I surveyed of certain portions of the public domain within the State of Utah. When the survey was done I prepared my map and plats and they were to be filed and then became a part of the records in the Land Office. When applications were made for entry whether coal land or agricultural land or any other mineral land, it was supposed to be in our survey records and they went to the Land Office. Huntington Canyon was in Emery County adjacent to Carbon County, and that was in a part of the general geological formation which prevailed both in Emery and Carbon Counties. It was in 1900 that I made that survey, 1901.

Cross-examination.

By Mr. Lacy:

We were not asked to explore the land for mineral or coal in making that survey. If I crossed it in running my line, I noted it.

[fol. 543] At this point the Independent Coal and Coke Company rested its case.

Clarence E. Milner, a witness offered and sworn on behalf of the defendant the Carbon County Land Company, testified as follows:

Direct examination.

By Mr. King:

I am a resident of Salt Lake City and a cit-zen of the United States. I am 47 years of age, and have resided in Utah practically all my life. I am a member or a stockholder in the Carbon County Land Company. I don't think I was a party to the original application for the purchase of any part or portion of the 5,500 acres of land involved in this action. Well, now, I am not sure whether the land I did purchase is in this parcel or not. I also purchased some state land, which is not involved in the original or-

ganization of the Carbon County Land Company. Yes sir, I am a son of the late Stanley O. Milner. I was connected with the Carbon County Land Company in the year 1920. The Carbon County Land Company entered into negotiations at that time with the State of Utah for the purchase of this land in question. There had been within a few years prior to that time, that is after the years 1906 and then up until 1920, some development work carried on in coal properties in the vicinity of Kenilworth and through that section of the country. In view of the knowledge which we then had the company sought to purchase those lands from the State. Yes sir, we finally entered into and negotiated a contract under which we purchased this land for $100.00 an acre. The company then executed this mortgage which has been heretofore introduced in evidence. In pursuance of those negotiations the company then received a patent to all of these lands. This transaction was entered into by my company in good faith for the purpose of honestly acquiring title to this land. My company has been in possession of this ground, except that 1120 acres which was sold to the Independent Coal and Coke Company since that time. The stock that was given by the Independent Coal and Coke Company for those lands was received by my company and distributed to various stockholders, and a portion of it has been sold to other parties. We haven't made any use of the other lands that we have had since that time except to lease them for grazing. They [fol. 544] are being so leased at the present time. Kenilworth is the closest railroad point to any part of this ground. Yes sir, I have heard the statements of the witnesses with reference to the coal outcropping along the escarpment of the mountain. I am familiar with that. The majority of these lands which are involved in this action lie from half a mile to as far back as two and one-half miles from this escarpment. These lands are back on what I term the plateau. The transaction under which the land was purchased by my company in 1920 does not have any connection whatever with the original application for land which was made for coal lands there. I don't think any of the stockholders of the company in 1920 were stockholders at the time of the organization of that company. In the negotiations which were carried on for the purchase of these lands we acted under the instructions that our

counsel gave us. The State owned the land. My company took the advice of the firm of King, Braffet and Schulder. Yes sir, those negotiations were carried on with the State Land Board of the State of Utah and with the then attorney general, Mr. Dan Shields, of Salt Lake City, and also Governor Simon Bamberger. As a result of these negotiations the lands were finally purchased upon the terms stated.

Cross-examination.

By Mr. Lacy:

I think I am a director of the Carbon County Land Company. I am not sure whether I am a director now or not, but I probably am. I am not sure there were none of the stockholders of the Carbon County Land Company now who were stockholders at the time of the organization. I think probably there was one man who was qualified as a director who was at that time a stockholder in the Carbon County Land Company. Harrison E. Jenkins is the man I am referring to. He represented as trustee at that time my father, Stanley B. Milner.

CLARENCE MILNER recalled.

Re-examination.

By Mr. King:

There is one stockholder, Harrison E. Jenkins, who owns 20 shares of stock for qualifying purposes. He is the only one.

Cross-examination.

By Mr. Lacy:

Yes, sir, Mr. A. C. Milner, the president, is my brother.

[fol. 545] J. S. MILNER, offered as a witness and sworn on behalf of the defendant the Carbon County Land Company, testified as follows:

Direct examination.

By Mr. King:

I reside in Salt Lake City. I am a member of the Carbon County Land Company. I was not an incorporator of that company. I had nothing whatever to do with the subject of filing the original application for any part or portion of the 5200 and some odd acres of land involved in this case.

Q. I will ask you to state if you were a stockholder in this company in 1920.

Mr. Lacy: I don't know the purpose of that evidence and I object to it for that reason.

The Court: Just as they did by the other witness, acting in good faith.

Mr. Lacy: I object to the Carbon County Land Company being heard here and now to say that because these stockholders were not parties to the application to secure this land that they acted in good faith.

The Court: I am inclined to agree with you, but I will let him take the testimony.

Examination by Mr. Wilson:

A. Yes sir, since I said I was connected with the company in 1920—I am not sure of that. I think I probably was. I am not sure that I was a stockholder. I was probably a stockholder and an officer. I am an officer at the present time. Yes sir, I knew of the negotiations that were commenced in 1920 up until the land in this suit was purchased from the State of Utah. At that time my brother, Mr. A. C. Milner, was president of the company. Yes sir, I knew at that time of advice being taken from the firm of King, Braffet and Schulder with reference to whether or not the State of Utah owned and possessed the legal title to the land in question. Yes sir, I received an opinion to that effect. I know of the negotiations through my counsel and through Mr. A. C. Milner here, carried on with the State of Utah leading to the purchase of these lands. They were subsequently purchased at $100.00 per acre, and the company received the patent which has been introduced in evidence, on the execution of a note and mortgage for $556,428.00. I knew that thereafter the Carbon County Land Company sold 1120 acres of this ground to

[fol. 546] the Independent Coal and Coke Company and received therefor the capital stock which has been mentioned here today. Yes sir, in those negotiations as an officer and a stockholder of that company, I acted in good faith dealing with the State of Utah in the purchase of this land at that price. So far as I know they were in good faith. I was in good faith in my action as a stockholder and an officer of that company.

Yes sir, at the time of the purchase from the State my company has been in control of this land, except such as were sold to the Coal Company, and had been leasing them for grazing purposes, keeping control—keeping them under control during all of that time. They have been leased for years. I can't say that at the time this present suit was instituted my company was then taking steps to develop these lands. Yes sir, I know of negotiations being carried on looking toward the organization of a coal company and also of an iron company that we might use these two properties together. I remember we had it up. Yes sir, we were considering those matters at the time of the commencement of this action in 1924.

SAMUEL A. KING, produced as a witness on behalf of the defendants, testified as follows:

I am an attorney-at-law and have been actively engaged in practice within the State of Utah since September 1, 1893.

In the year 1920 I was then a member of the firm of King, Braffet & Schulder, the other two members of the firm at that time being Mr. Mart T. Braffet, now deceased, and Mr. Russell G. Schulder, now deceased. At that time we were employed by the Carbon County Land Company for the purpose of investigating as to whether the legal title to the lands involved in this suit then rested in the State of Utah or if not where the legal title rested and what steps were necessary to procure a good and valid title to these lands.

Accordingly myself and partners investigated extensively the legal questions involved and subsequently rendered an opinion to the Carbon County Land Company, that is in

our judgment the legal titles to the land in question rested in the State of Utah.

After the giving of this opinion I personally was instructed by Mr. A. C. Milner, president of the Carbon County Land Company to begin negotiations with the State of Utah looking to the purchase of these lands.

[fol. 547] Accordingly I arranged an interview first with the Secretary of the State Land Board, Mr. Arthur Kuhn, as I remember his name, and subsequently with the other members of the Land Board, Mr. Davis and Mr. Jones. I can't at this time recall the names of the other members of the board. In these negotiations Mr. Dan B. Shields, then attorney general of the State of Utah, was called into consultation respecting the opinion which we had given respecting this matter, in which opinion Mr. Shields concurred, and acting upon the suggestion which we made and the proposition which we submitted and when I say we, I mean Mr. Milner and myself, the matter was taken under advisement by the State Land Board and thereafter Governor Simon Bamberger was called into consultation.

After numerous investigations by the Governor and by the members of the Land Board and the secretary of the board and the Attorney General, Mr. Dan B. Shields, the proposition was finally—the deal was finally agreed upon and the terms of sale were accepted accordingly.

Under the terms of this sale, as I now recall, the lands were all purchased for $100.00 per acre, the State of Utah agreeing to execute a patent for the land and would then accept a mortgage on the land and accept a note of the company secured by mortgage upon the land, mortgage running for a period of 30 years, and as I now recall, interest waived for the first five years. The deal was finally and fully consummated and a patent issued and notes and mortgages of the company were executed.

At that time an offer was made to purchase these lands upon the basis, I think, of $25.00 an acre, and it was refused. We finally offered on a basis of $50.00 an acre and Simon Bamberger, then Governor, declined to accept that price, saying that the State owned the lands and would not sell it under any circumstances for less than $100.00 an acre, and we finally accepted that, in order to make the purchase and agreed to pay them $100.00 an acre for the land in question, and that was due almost entirely to the

business instinct of the then Governor of the State, that our people were induced to pay $100.00 per acre, more than $500,000 for this land.

In all these negotiations at the time there was nothing but the utmost good faith expressed by all of the members of the Carbon County Land Company for whom we appeared, and this was particularly true with respect to the members of the Land Board and the Attorney General of the State of Utah and the Governor of the State of [fol. 548] Utah, and believing these negotiations would secure the title to the land a proposition was submitted by the Independent Coal and Coke Company to purchase a part of this land and thereafter myself and my partner Mr. Schulder went over into consultation with Mr. M. E. Wilson, the attorney for the Independent Coal and Coke Company and gave to Mr. Wilson briefly our opinion concerning the title to these lands and the manner by which that title had been acquired by the Carbon County Land Company and gave him all of the data which we had collected with respect to these matters, and thereafter Mr. Schulder to some considerable extent carried on the negotiations and had numerous conferences with Mr. Wilson. Mr. Schulder acted in this matter far more than myself and ultimately received the concurrence of Mr. Wilson and finally by Judge Morse in the opinion which Mr. Schulder and myself and Mr. Braffet had originally given, and then this land was sold to the Independent Coal and Coke Company, for the figure, I think the different witnesses have mentioned.

Examination by Mr. Wilson:

Yes sir, 1500 and some odd acres was the entire sale, and there are 1120 acres involved in this particular tract. Those negotiations were carried on with the utmost good faith and as a part of the compensation for the services which the firm of King, Braffet & Schulder had received, we received a part of that stock from the Independent Coal and Coke Company, passing of course through the Carbon County Land Company, and we received as I remember somewhere in the neighborhood of 11,000 or 12,000 shares of that stock as a fee.

Cross-examination.

By Mr. Lacy:

As to whether I became pretty well convinced in 1920 when I paid $550,000 for this land that that coal continued back from that escarpment for several miles, there had been a great deal of development work carried on.

There had been done since 1906—since 1906 to 1920—a vast amount of development work in the neighborhood, first in the Kenilworth mine and later at what was known as the Panther property which lies between Castle Gate and Kenilworth and subsequently a development of what is known as the Willow Creek mine, now a part of the Castle Gate property which lies north of any of these lands in question, and this subsequent development work tended to strengthen our opinion probably of the continuation of at least upon a part of this ground of these coal veins, but [fol. 549] it was due entirely to the subsequent development work that had been done there between 1906 and 1920, that the company was willing to enter into negotiations for the purchase of this land.

No, sir, none of that development work that I speak of, these mines are under this particular land. They are upon a portion of the land immediately west and further to the north; the development work to the north there had been carried on, leading to the development of some of these same lands and led very strongly to the conclusion there was coal there. On the land itself there was no development work whatever. Between 1901 to 1904, I am not able to say, because I personally was not interested in the land. I don't know of the development actually done upon the land. I don't think when we paid $100.00 an acre for this land I acted on this geological inference theory as to coal being under it. I don't think it would depend entirely upon geological inference because in some sections of the country those geological inferences were in a great many instances down there absolutely shown to be untrue, and a lot of the alleged geological inferences that had been drawn by some of the best experts in the company had been shown to be absolutely untrue and unfounded. I don't know of any purchaser who would give $100.00 an acre for this par-

ticular land at the time we paid it. I wouldn't give $25.00 for it now.

Examination by Mr. Wilson:

I am not interested in the Independent Coal and Coke Company, other than the stock which I received as subsequent to the sale. That has all been sold at the present time and has been for some years, at least for 6 or 7 years.

At this point, Mr. Parker offered in evidence from the record in Circuit Court of Appeals in the case of Truth A. Milner, et al. v. United States of America, a letter signed by W. A. Richards, and also the evidence from the same record of William S. Hedges. The letter of W. A. Richards is as follows:

(Letter mentioned above printed at page 370 of this record.)

The record of the testimony of WILLIAM S. HEDGES offered and received in evidence without objection to the form in which it is offered is as follows:

[fol. 550] Direct examination.

By Mr. Maynard:

"I am the same gentleman who testified on behalf of the plaintiff in this case. I have been chief clerk of the Surveyor General's Office since 1902. I have had a general knowledge of and have known the practice of the office ever since that time, and knew what it had been or had learned what it had been prior to that time for a period of two or three years.

"With respect to the practice under the customs and rules of the Land Office of the United States when a survey has been made by a deputy surveyor on behalf of the government and as to whether or not it is a requirement that the plats be made in our office from the field notes submitted by the deputy surveyor, and said plat when made in our office submitted to the Commissioner of the General Land Office, I will say the first procedure is that the surveyor is to go to the field and make his surveys and then he returns to our office his notes with a preliminary plat,

and then we take up his notes and his preliminary plat, and examine them and correct them so far as the observations mentioned in his survey and things of that kind are concerned, and we then make three copies, one we keep or retain in our office, another copy we send to Washington and the third copy we deliver to the Land Office. We do not deliver the copy to the Land Office until the commissioner of the General Land Office has approved the survey. "The classification as to the character of the lands to be submitted to the commissioner of the General Land Office is made from the notes furnished by the surveyor. The original notes are not transmitted to the Commissioner of the General Land Office with the plats, but a copy of the original notes is transmitted to the commission. The original notes are retained in the office of the United States Surveyor General. Those notes submitted to the Surveyor General by the surveyor who made the survey in a general way inform the Surveyor General as to the physical conditions found upon the ground by each mile as surveyed. As to how we indicate on these plats that are submitted to the Commissioner of the General Land Office the character of the lands, will say, at the end of each mile, the surveyor states the character of the land that he has gone over each mile. At the end of the survey of that township he makes a general description, and in that general description he gives a summary of all the survey made on that township. [fol. 551] "If no mineral land or coal land (in) indicated from the field notes of the Surveyor General by a symbol represented by a circle with a cross inside makes a note that that is returned as mineral or coal land, whichever it may be. That is the way the return is made, as mineral or coal land we make a circle with a cross in it. Where it is returned as non-mineral or non-coal no notation whatever is made. That is considered as the classification of non-mineral or non-coal land. The Commissioner of the General Land Office upon the approval of the plat in his office notifies the United States Surveyor General that the plats have been approved and we are authorized to file the triplicate plat with the Register and Receiver, so that the plat filed with the Register and Receiver is a triplicate plat of the plat that has been approved by the Commissioner of the General Land Office, and the classification

upon the plating filed in the office of the Register and Receiver is the same classification as that made by the Commissioner of the General Land Office before the plat is filed in the office of the Register and Receiver.

Cross-examination:

"The original notes made by the surveyor in the field are retained in our office, and the plat which is subsequently made in triplicate. One of those plats with a copy of the original notes is sent to Washington and retained there in the office of the Commissioner of the General Land Office. When the plat is filed in the local office we file no notes with the Register and Receiver whatever, but a copy of the original notes *are* retained by the Commissioner.

Redirect examination:

"I do not know as to whether after notes and the plat are filed with the Commissioner of the General Land Office, if he sees fit, he makes corrections in the classifications that have been made from the field notes. We have no information whether he makes out a classification or not. The only thing I know is we submit the field notes and make a classification before it leaves here and then when it comes back it comes back with the approval or disapproval of the plat that we have made. That is the idea, and that also includes the classification that was made by the Deputy Surveyor; the Deputy Surveyor makes the classification, but the Surveyor General notes it upon the plat. The testimony that I have given here is in reference to what the rule of the General Land Office was during the entire period from January 1, 1900, to December 31, 1905, and so far as I know that was the rule for an indefinite period [fol. 552] of years prior to that time. I have examined notes and plats filed since the existence of the Surveyor General's office, and I find that that has been the rule with all plats as far as I have examined them. So that so far as my knowledge goes and according to my best information that has at all times been the rule of the General Land Office in reference to the preparation of plats and the classification of lands represented by the plats.

"Friday, February 17, 1911.

"By Mr. Edwards:

"'It is admitted between counsel for the respective parties that the approval of the plats prepared by the Surveyor General as testified to by Mr. Hedges was approved by the Commissioner of the General Land Office and a triplicate thereof filed in the office of the Register and Receiver of the local Land Office in Salt Lake City, Utah, prior to the time when any of the applications by the defendants in this case were made to the State Board of Land Commissioners for the purchase of any of the land, the subject matter of this action, prior to the time when selection lists were filed by the State Board of Land Commissioners of the State of Utah with the local Land Office in Salt Lake City, Utah.'"

GEORGE G. BYWATER, a witness offered and sworn on behalf of the plaintiff in rebuttal, testified as follows:

Direct examination.

By Mr. Lacy:

I reside in Salt Lake City. I am a mining engineer with the Government and have been engaged in that work eight years, eight years the first of August this year. I am a graduate mining engineer from the University of Utah with the degree of Bachelor of Science, in which institution I graduated in 1909. In 1911 and 1912 I studied graduate geology, majoring in that subject, and since that time I have plied my profession in the State of Utah, Colorado, Old Mexico, Arizona and Nevada. I am very well acquainted with the country in the neighborhood of the Kenilworth mine at Price and Book Cliffs where the land in question here is located. The cliff or escarpment has been cut in many places by canyons and gulches, and because of these erosional features there have been left jutting out towards the valley finger-like points, that is streams have cut back northerly in this particular case and left a long projection point to the cliff, just jutting towards the valley.
[fol. 553] On these points, most of them, there has been burning, that is the coal which at one time outcropped in

these jutting points has been ignited in some way and have burned partly in some cases more than one seam of coal is burned and in other cases only one seam of coal is burned. There are places on these points where fresh coal still outcrops.

Where these burnings occur, the nature of the enclosing rock, sandstone principally, has been changed and you can follow these burns by the color or the discoloration of the original rock that occur on these points that jut out and as you follow them back into the canyon that has been cut into the escarpment you follow back, and as you get into the bed of the canyon you find where the burning cuts out and the fresh coal in the seam comes in in the canyon.

Now all these points are narrow, as a great number of them are especially in this vicinity where these sides are exposed, that burning may occur and does occur in many instances all across that point. In other words, it occurs from the base of the canyon out southerly in this particular case around the point and back into the next canyon.

However, as stated before, as you leave the canyon floor where the coal seam dipping back from the face of the escarpment on the point comes near the canyon floor, the burning ceases, so far as the outcrop is concerned, and you pick up the fresh coal again.

Q. What causes the cessation of burning, in your opinion?

A. The cessation of burning naturally is caused by the cutting off of the atmospheric supply to the coal in these narrow points. Aside from being in a position where they might naturally become ignited this coal might naturally become ignited either by spontaneous combustion or otherwise, the rocks are fractured and that is where erosion has taken place on the surface to a great extent, the rocks are fractured and as the burning takes place and continues back, the rocks fracture, admitting more oxygen from the atmosphere.

Now this takes place until we get back far enough so that you might take a straight line you might say half-way between the end of the jutting point and the coal outcrop back into the canyon and about that position you get into the more solid face of the cliff and then the fracturing

ceases, you have a greater amount of overburden and a more arched structure in the rock, and at that point had [fol. 554] burned near half way between the end of the jutting point and the base of the canyon where the coal outcrops, and such a condition as will stop fracturing, also stop the ignition of coal for any considerable distance back.

Yes sir, I am familiar with the burned area that was referred to yesterday in the canyon called Bull Hollow or Bull Canyon. Bull Canyon or Bull Hollow and another canyon to the west of Bull Canyon have caused a long jutting point to drop down into the northwest quarter of section 16 and partly into the southwest quarter of section 16, township 13 south, range 10 east. The point in section 16 is very narrow to its length, and burning has commenced there and has continued back on the left-hand side of Bull Hollow for a distance on the outcrop of practically half a mile and on the other side of this jutting point towards the Price River site the burning has continued back on the outcrop for possibly two miles, where on the left-hand side or the west side of Bull Hollow the burning has continued back something better than a quarter to half a mile.

You could assume that the full point has been burned out in that half-mile point, we will say back in section 9 of township 13 south, range 10 east, across into section 7, so that on that particular point there is considerable area burnt out where prospecting was done on that particular point by the Independent Coal and Coke Company and its predecessors, some 1300 of tunnel was made in this burnt area before any fresh coal was encountered, and it was discovered that operations in that particular point would not be commercial, because of the fact that immediately to the right or east of this burning high-grade thick seams of coal appeared in the outcrop. It was a matter of comparison you might say. It would not pay to operate a burned point when immediately adjacent to it fresh coal appeared in the outcrop.

In this particular area I think the Bull Hollow burning is the most intense of all. All of the points are burned, however, I don't recall one point that is now. The lands marked in purple on the map in my opinion could not be affected at all by any burning. In the first place the burning on the outcrop does not reach the southern boundary

of the lands marked in purple on this map and if the burns continued beneath the surface farther back, north in this case, than the burning on the outcrop it would be a very very peculiar condition because the outcrop of coal is naturally more accessible to atmospheric agency than coal under cover, and if this coal were burnt back it would get [fol. 555] back; it would come back and burn the outcrop, and the coal in the canyon on the canyon floor and for a considerable distance along the cliff or escarpment in the canyon is fresh, unburned coal.

Cross-examination.

By Mr. Wilson:

No sir, I would not think that the entire condition through that country is somewhat peculiar from a geological standpoint. I don't know who the geologists are who have so considered it. I don't recognize what geology is at was expressed here yesterday, a matter of theory. I don't claim it is an exact science in all of its aspects. I would say that to explore it is not the only certain way to find out whether a vein of coal is burned out. If we consider it is a part of the science of geology. I feel I have so developed the science in my own mind that I can do it without it. I don't necessarily consider it a part of the science of geology. This burning is a natural phenomenon and has taken place since any geological strata or any geological phenomena. It affects the geological conditions. That is true, if coal or mineral is destroyed, it is gone no matter what destroys it. That is what a geologist in practice has to contend with. You take into consideration whether there is burnings or whether there is wants or there is faults or anything else that occurs. These things all affect the deduction that might be arrived at from the facts known. These matters are always matters of deduction until there is an explanation or an exploration. Yes sir, sometimes deductions are erroneous in geology just as well as in other matters.

Examination by Mr. Parker:

These statements that I have made are facts as I saw them on the ground, not theory. The distance that the burning might be back of the outcrop is in my opinion de-

ducted from the facts as found. It is my opinion of what does exist there. The Independent Coal and Coke Company run a tunnel some 1300 feet into the burnt coal on the point that juts down into section 16 on the right-hand side of Bull Hollow. I said they run that before they found any fresh coal. Then they abandoned that and commenced work to the east. Evidently this situation with reference to the burnt coal apparently was not understood and was not so obvious to them as it now appears to me, otherwise they would not have run that tunnel in the first instance. I might state that in most instances where coal was burnt on the surface, prospecting had been done. This matter of burning is not a geological theory. It is a fact. Yes, it [fol. 556] was understood by those practical miners when they drove that tunnel at that time. Their experience had been prior to that time that the burning extended from 300 to 500 feet back of the escarpment.

Q. And apparently they found what seems clearly obvious to you as not the fact, otherwise they would not have done this thing, would they?

A. Obviously they would not have done it. They didn't make any study of their conditions.

It is true they didn't understand the conditions as they existed on that particular point. I think that is true, that it was so clear and obvious that it would not even take a geologist to understand it. As to these men, practical coal miners going in there and driving a tunnel, doing an obvious useless thing to the extent of 1320 feet into this burnt coal, that is true.

Re-examination by Mr. Wilson:

I don't know when that was done. I don't know anything about it of my own knowledge. As to having seen it, I don't know who the predecessors of the Independent Coal and Coke Company were or whether that company had any predecessors. About that particular work, yes, my testimony given here is simply hearsay.

Here the mortgage dated January 2, 1920, given by the Carbon County Land Company to the State of Utah, was offered by the defendants and read in evidence as follows:

"Mortgage

"This indenture, made this 2nd day of January, A. D. One Thousand Nine Hundred Twenty, by and between the Carbon County Land Company, a corporation, by A. C. Milner, President, and E. Stanley Pratt, Secretary, of the County of Salt Lake and State of Utah, parties of the first part and the State of Utah, party of the second part:

"Witnesseth, That the said parties of the first part in consideration of the sum of Five Hundred Fifty-six Thousand Four Hundred Twenty-eight ($556,428.00) Dollars to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, by these presents, do grant, bargain, sell, convey and confirm, unto the said party of the second part, and to its successors and assigns forever, all of the following described tract of land, situate in the County of Carbon and State of Utah, to-wit: [fol. 557] "The North half of Section Twenty-six (26); the Southeast quarter and the Northwest quarter of Section Twenty-two (22); the East half of Section Twenty-seven (27); all of Section Thirty-four (34); the South half of Section Thirty-five (35); all of Section Thirty-three (33); Township Twelve (12) South, Range Eleven (11) East, Salt Lake Meridian.

"Also, all of Section One (1), all of Section Three (3), the North half of Section Ten (10), the North half of Section Eleven (11), the North half and the Southeast quarter of Section Twelve (12), the East half of the Northeast quarter of Section Fourteen (14), Township Thirteen (13) South, Range Ten (10) East, Salt Lake Meridian.

"Also, Lot One (1), the Northeast quarter of the Northwest quarter, the Northeast quarter, the North half of the Southeast quarter, the Southeast quarter of the Southeast quarter, Section Seven (7), Lots One (1), Two (2), Three (3), the Southeast quarter of the Southeast quarter of Section Three (3), Township Thirteen (13) South, Range Eleven (11) East, Salt Lake Meridian. Containing in all 5564.28 acres.

"To have and to hold the same with all appurtenances hereunto belonging, forever. And the said parties of the first part do hereby covenant and agree, that at the de-

livery hereof they are the lawful owners of the premises above granted, are seized of a good and indefeasible estate of inheritance therein, free and clear of all encumbrances of whatsoever kind and character, and that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, its successors and assigns, forever, against the lawful claims of all persons whomsoever.

"Provided, always, and this instrument is made, executed and delivered upon the following conditions, to-wit:

"First. Said Party- of the first part are justly indebted and promise to pay unto the party of the second part, the sum of Five Hundred Fifty-six Thousand Four Hundred Twenty-eight and No/100 ($556,428.00) Dollars, lawful money of the United States of America, being the purchase price of the lands described herein and sold by the party of the second part to the party of the first part, according to the tenor of three principal notes, executed and delivered by the said parties of the first part, all bearing date of [fol. 558] January 2, 1920, and payable to the said party of the second part on the dates and in the sums as follows: One note in the sum of $100,000.00 payable on or before January 2, 1930, bearing interest at the rate of five per cent per annum from and after January 2, 1925, payable annually on the 2nd day of January of each year, and eight per cent per annum after maturity; one note in the sum of $200,000.00 payable on or before January 2, 1940, bearing interest at the rate of five per cent per annum from and after January 2, 1925, payable annually on the 2nd day of January of each year, and eight per cent per annum after maturity; and one note in the sum of $256,428.00, payable on or before the 2nd day of January, 1950, bearing interest at the rate of 5% per annum from and after January 2nd, 1925, interest payable annually on the 2nd day of January of each year, and eight per cent per annum after maturity.

"—2—

"Second. The party of the second part hereby agrees that it will upon the payment of $54,000.00 principal, at any time, release from this mortgage 640 acres of the land described herein, to be designated by the party- of the first

part, in compact form, and will likewise release additional 640 acre tracts upon payment of like additional amounts in the sum of $64,000.00.

"Third. Said parties of the first part hereby agree to pay all taxes and assessments levied upon the said premises when the same are due; and to pay to the party of the second part, or assigns, on demand, any money advanced by the party of the second part, or assigns, to remove, purchase or extinguish any prior or adverse or outstanding title, lien, claim or incumberance or said premises or in any manner to protect its lien thereon; and if not so paid, the said party of the second part, or the legal holder or holders of this mortgage, may, without notice, declare the whole sum of money herein secured due and payable at once, and the mortgagees or assigns may pay such taxes and assessments, and the amounts so paid shall by a lien on the premises aforesaid, and to be secured by this mortgage, and collected in the same manner as the principal debt hereby secured, with interest thereon at the rate of ten per cent per annum.

"Fourth. Said parties of the first part hereby agree to keep all the buildings, fences and other improvements upon said premises, in good repair and condition as the same are at this date, and abstain from the commission of waste on said premises until the notes hereby secured are fully paid.

[fol. 559] "Fifth. Said parties of the first part hereby agree that if the makers of said note shall fail to pay or cause to be paid any part of said money, either principal or interest, according to the tenor and effect of said notes when the same becomes due, or to conform to or comply with any of the foregoing conditions or agreements, the whole sum of money hereby secured shall, at the option of the legal holder or holders thereof, become due and payable at once without notice to the makers hereof or their assigns. And in case suit is brought to foreclose this mortgage, the parties of the first part agree to pay a reasonable attorney's fee to be awarded by the court and included in the judgment.

"The foregoing conditions being performed, this conveyance to be void; otherwise, of full force and virtue.

"In Testimony Whereof, The said parties of the first part have hereunto subscribed their names on the day and year first above mentioned.

"Carbon County Land Company, by A. C. Milner, President. By E. Stanley Pratt, Secretary. (Corporate Seal.)

"Signed and delivered in the presence of V. L. Arnold, Jay S. Milner.

"STATE OF UTAH,
County of Salt Lake, ss:

"On the 29th day of January, 1920, before me, the subscriber, a Notary Public in and for the County of Salt Lake, State of Utah, personally appeared A. C. Milner and E. Stanley Pratt who being first duly sworn did say that they are, respectively, President and Secretary of the Carbon County Land Company, and that the foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and said A. C. Milner and E. Stanley Pratt acknowledged to me that said corporation executed the same.

"In Witness Whereof, I have hereunto set my hand and affixed my official seal at Salt Lake City, in said county, the day and year last above written.

"V. L. Arnold, Notary Public. My Commission Expires —— —, ——. (Seal.)

[fol. 560] "The Board of Directors of the Carbon County Land Company met in legal session on the 29th day of January, A. D. 1920, at the office of the said company in Salt Lake City, Utah, at 1:30 *P. M.* o'clock P. M.

"The meeting was called to order by A. C. Milner, presiding, all members of the Board being present.

"Mr. Harrison E. Jenkins submitted the following resolution and moved its adoption:

"Be it resolved by the Carbon County Land Company that the action of the State Board of Land Commissioners of the State of Utah, taken at its meeting held on December 19, 1919, as set forth in a resolution adopted by it on said date, relative to the sale of the Carbon County Land Company of the lands embraced within State Certificate of

Sale Nos. 4588, 5136, 7174, 9042, and 8564, be accepted, agreed to and confirmed, said resolution being in words and figures as follows, to-wit:

"Whereas at a meeting of the Board held on January 8, 1907, F. E. Maynard, Special Assistant to the Attorney General of the United States, appeared before the Board in relation to Certificates of Sale Nos. 4588, 5136, 7174, 8042 and 8564, and stated in effect, as appears in the minutes of the Board of said date, that the purpose of his appearance was to officially inform the Board of the fact that the Attorney General of the United States, had caused to be filed a bill of complaint in the Federal Court, a copy of which was presented, involving the lands embraced in said certificates; that the State of Utah had purposely not been made a party to the bill; that the only relief asked is that the State be relieved of its contract with the Milners for the sale of said lands; that the legal title to the lands is in the State of Utah; that if the Government is successful the legal title will be in the State of Utah; that it was not sought to deprive the State of the lands involved, but to prevent the lands embraced in said certificate- from being acquired by fraud:

"And whereas Mr. E. W. Senior, attorney for the Milner Estate at that time stated that they would not ask for patents to issue for the lands involved until the question of the character of the land is determined by the courts; that they claimed the lands are such as are subject to selection and that the State has entered into a contract and has received payments for the same and that they would [fol. 561] never ask for patents to issue until the full terms of the contracts had been complied with and all payments made;

"And whereas Mr. Maynard in reply to the statement of Mr. Senior stated that he was satisfied with the proposition submitted by Mr. Senior;

" 'And whereas the Board by resolution adopted on said date consented to accept payments on said certificates, except the final payment, which was not to be accepted until the rights of the applicants to demand patent for said lands shall have been determined by the Court;

" 'And whereas the Carbon County Land Company, which holds said certificates by assignments, has submitted a prop-

osition to this Board for the settlement of all disputes between it and the Board respecting said lands, whereby it is intended to disregard the purchase price as set forth in their contracts for said lands and fix a price which shall be fair and equitable to all parties concerned, and for the further litigation to determine the right of the State or the right of the said company to said lands;

"And whereas the result of the bill filed by Attorney Maynard was that a decree was entered in favor of the United States and against the Milner Estate, but not against the State of Utah;

" 'And whereas this Board is of the opinion that the title, both equitable and legal, to the lands involved is vested in the State of Utah;

" 'Now, therefore, be it resolved, that the lands involved be conveyed by the State of Utah to the Carbon County Land Company on the following conditions, to-wit: The purchase price to be $100.00 per acre on all of the lands embraced within said certificates, which embrace 5564.28 acres, or a total of $556,428.00, payable as follows: $100,000.00 on or before Jan. 2, 1930, $200,000.00 on or before Jan. 2d, 1940, and $256,428.00 on or before Jan. 2d, 1950, to be evidenced by three notes in the above respective sums and payable as above set forth, bearing interest at the rate of five per cent per annum from and after Jan. 2d, 1925, until maturity and 8% thereafter until paid, said notes to be secured by a mortgage in favor of the State given by the Carbon County Land Company embracing all of the lands embraced within said certificates, with the right of the mortgagee of paying said mortgage in part or in full at any time, and with the further right to the mortgagor of having [fol. 562] released from said mortgage any 640 acre tract upon the payment of $100.00 per acre therefor, said principal payments above specified to apply on said payments.'

"And be it further resolved by the Carbon County Land Company that A. C. Milner as President, and E. Stanley Pratt as Secretary, respectively, of the Carbon County Land Company be and they are hereby authorized to sign, on behalf of the Carbon County Land Company, three promissory notes in favor of the State of Utah, all bearing date of January 2, 1920; one of said notes to be in the sum of $100,000.00, and due on or before January 2, 1930; one

said said notes to be in the sum of $200,000.00, and due on or before January 2, 1940; and one of said notes to be in the sum of $256,428.00, payable on or before January 2, 1950; all of said notes to bear interest from and after January 2, 1925, at the rate of five per cent per annum, interest payable annually, until maturity, and eight per cent per annum thereafter until paid; and also, in order to secure the payments of said notes, to execute, on behalf of the Carbon County Land Company, a mortgage in favor of the State of Utah covering all of the lands embraced within State Certificates of Sale Nos. 4588, 5136, 7174, 8042 and 8564, issued by the State Board of Land Commissioners.

"Mr. Jay S. Milner seconded the motion for the adoption of the foregoing resolution, and the same, on being put to a vote, was unanimously carried.

"STATE OF UTAH,
County of Salt Lake, ss:

"Office of the Carbon County Land Company

"I, E. Stanley Pratt, the *f*uly appointed, qualified and acting Secretary of the Carbon County Land Company, do hereby certify that the foregoing two typewritten pages are a full, true and correct copy of the minutes of a legally called meeting of the Board of Directors of the Carbon County Land Company, held on the 29th day of January, A. D. 1920, as the same appears of record in my office; that I personally attended at said meeting, and the foregoing proceedings were in fact held as set forth in said minutes.

"In Witness Whereof, I have hereunto set my official signature and affixed the seal of the Carbon County Land Company, at Salt Lake City, Utah, this 29th day of January, A. D. 1920.

"E. Stanley Pratt, Secretary of the Carbon County Land Company. (Seal.)

[fol. 563] #90064. Filed for record 4:30 o'clock P. M., Feb. 24, 1920, and recorded in Book 4-G page 350. J. A. Crockett, Recorder Carbon Co., Utah. By ——— ———, Deputy. State Board of Land Commissioners. Received Mar 1, 1920. 9 A. M."

Dictated. A. S. J. 02-4

Horace F. Clark, Land, Mining and Patent Attorney, Rooms 26 to 30, Baltic Building, Washington, D. C.

Division "G," State of Utah Selections, List 75, Agricultural College.

Honorable Commissioner of the General Land Office.

SIR: In the above entitled list of lands selected by the State of Utah, on account of the grant to the State contained in the Act of July 16, 1894 (28 Stat., 108-110), I hereby enter my appearance on behalf of the State as to the following tracts of land, selected in said list:

Lots 1, 2 and 3; S. ½ of N. E. ¼; S. E. ¼ of N. W. ¼; E. ½ of S. W. ¼ and S. W. ¼ of Sec. 9, T. 15 S., R. 14 E. All of Sec. 10, T. 15 S., R. 14 E. N. ½ of N. E. ¼ Sec. 15 and W. ½ of Sec. 15, T. 14 S., R. 14 E. All of Sec. 5, T. 13 S., R. 10 E. Lots 1, 2, and 3; S. ½ of N. E. ¼; S. ½ of N. W. ¼; N. ½ of S. E. ¼ and N. ½ of S. W. ¼ Sec. 8, T. 13 S., R. 10 E.

Kindly advise me of all action taken in the premises.

Very respectfully, Horace F. Clark.

U. S. General Land Office, Received Sept. 16, 1903. 156684. Horace F. Clark, City. Sept. 12, 1903. Appearance for State of Utah, List 75, Agricultural College. J. R. 96/3rd4. (1)

[fol. 564] And thereafter, and after argument by the respective counsel for the respective parties, the following occurred:

The Court: What I would like you gentlemen to do is to formulate a decree which would present the views of this court that this court holds that the transaction—any transaction with respect to this land with the Carbon County Land Company, with or by the Carbon County Land Company by virtue of that decision is null and void, also without any force and effect.

Mr. Wilson: That is one thing.

The Court: And the other is that the statute of limitations has run against the United States and in favor of the State.

Mr. Wilson: I will draw such a decree if I can.

Lodged in office of Clerk of United States District Court for District of Utah Oct. 11, 1929.

John W. Christy, Clerk.

OBJECTION TO THE SETTLEMENT OF PROPOSED STATEMENT

And now come the State of Utah and the Independent Coal & Coke Company, and each for itself objects to the settlement of the statement proposed by the United States of America, consisting of 977 pages, in the above entitled cause, for the reason that the proposed statement is in violation of the provisions of Subdivision (b) of Equity Rule No. 75, which requires that the evidence to be included in any statement shall be stated in a simple, condensed form, and that all parts not essential to the decision of the questions presented by the appeal should be omitted; that the violations of the above quoted rule in said proposed statement are indeed numerous, but consist in part as follows:

1. On pages 2 and 3 of said statement a copy of a record of the Independent Coal & Coke Company, showing the amount of taxes paid on the land involved was introduced, and yet this proposed record contains the entire letterhead of the Independent Coal & Coke Company, the name of its officers and the fact that the Independent Coal & Coke Company gives notice that its agreements for the sale of coal are subject to the contingencies of strikes, accidents, riots, acts of God, lockouts, fire and flood and inability to secure [fol. 565] transportation. It is apparent from the face of the record that such statements have no either direct or remote relevancy to the questions involved on this appeal.

2. In the testimony of Joseph A. Taff, commencing on page 8 of the proposed statement, his age, his life history are all inserted in this proposed statement, and his testimony covers pages 8 to 136 of said proposed statement, whereas, the substance of his testimony could, with a little diligence, have been reduced to at least ten pages.

3. The original bill of complaint in equity case No. 281 between the United States of America, as complainant, and Truth A. Milner, et al., as defendants, is incorporated in

this proposed statement, covering pages from 137 to 177. Said entire original bill of complaint was superseded by the second amended bill of complaint in said cause, and that is likewise included in this proposed statement and covers pages from 177 to 216, and this is followed by the joint and several answer of Truth A. Milner, et al., which covers pages from 217 to 315 of said proposed statement. The entire one-half of page 216 of the proposed statement is restated verbatim on page 217. These pages of the record from 137 to 315 might have been, by a little effort, reduced to not exceeding 20 pages, stating every fact that was either material or even remotely relevant to any question involved relevant to any question involved in this case.

4. Pages 474, 475, 476, 481, 482 and 483 appear to be mere forms of assignment in blank, not filled out and useful for any purpose in this case.

5. The minutes of proceedings before the State Land Board, contained on pages 315 to 322 of the record, are copied verbatim, whereas, by a slight effort, they could have been materially condensed.

6. Pages 323 and 497 are the proceedings involving the selection of the land by the State of Utah, and these might have been reduced to a small number of pages.

7. Pages 498 to 514 are covered by the Articles of Incorporation of the Carbon County Land Company. These Articles of Incorporation are set forth verbatim and they show the purposes of the corporation, the incorporators, the provisions relative to meetings of stockholders, powers of the various officers, the manner under which such officers may resign, and many other provisions that could not be in any wise material or relevant to any question of fact [fol. 566] or law involved in this case. Whatever relevancy these Articles may have had could have been stated in not to exceed two pages, and then all of the oaths and verifications relative to the execution of the Articles, and even the oaths of the directors required by the statute are each separately set forth. The certificate of the County Clerk that these Articles are true and correct copies of the original Articles, all of which was conceded, is set forth, and could have been set out in a simple statement of that fact covering not more than a few lines of one page.

8. From page 514 to page 533 is the testimony of Henry Wade. This evidence is unnecessarily set out at great length, whereas, all that would be material in this action could have been set forth in a few pages.

9. The testimony of J. E. Gibson appears on page 533 and covers many pages of the record.

10. On page 559 the testimony of C. W. Morse is copied into record, including the full statement of the opinion given by him, whereas, all that was necessary was to state the substance of that opinion, which substance could have been stated in a few sentences.

11. On pages 552 to 558 are set out verbatim declaratory statements and powers of attorney, all of which were unnecessary to the record, and if there was any fact appearing therein that was relevant, it could have stated in a few lines of one page.

12. On page 567, et seq., for four full pages, is a verbatim copy of the State Patent to the land involved, with the testimonium clauses and acknowledgements all set out in full.

13. On pages 571, 572, 573 and 574 are the notes given by the Carbon County Land Company to the State of Utah, all set out in full, whereas, the fact that notes were given could have been stated in three lines on any one page of a proper statement.

14. On pages 557, et seq., appears a letter by W. A. Richards, Commissioner, to the Honorable Secretary of Interior relative to the practice of the General Land Office. This covers pages 577 to 592 inclusive. This letter involves a consideration of many legal authorities cited by the writer, and quotations from them, and their relevancy or materiality to any question involved in this case cannot be discerned.

15. Commencing on page 593 and continuing to and including page 625 of said proposed statement, is a verbatim [fol. 567] copy of the certified copy of the Articles of Incorporation of the Independent Coal & Coke Company. Whatever is relevant or material to this case could have been stated on one page of any proper statement.

16. On page 627 and a subsequent page not numbered may be found the minutes of the State Land Board proceedings, set forth verbatim. The relevant facts could have been stated on a half page.

17. On pages 628 to 665 is the testimony of M. E. Wilson, set forth in unnecessary detail; letters and correspondence introduced to show certain facts, all set out verbatim, whereas, the relevant facts could have been stated on one or two pages of any proper statement.

18. On page 665 commences the testimony of John H. Tonkin. On page 678, particularly the narrative of that testimony is not in accord with the transcript of the reporter's notes. On page 680 of the reporter's notes, and following, Mr. Tonkin testified that no one could tell, from a mere surface inspection, as to the extent of the burning or whether commercial coal existed beyond that burning; that it was all a gamble, whereas, the proposed statement indicates that the witness gave testimony that he could tell whether there would be commercial coal beyond the burned out area or not by an inspection.

On page 679, et seq., of the testimony of this witness is a verbatim copy of the warranty deed given by the Carbon County Land Company to the Independent Coal & Coke Company; then commencing on page 683, et seq., down into page 689, is a statement of the other testimony given by the witness Tonkin.

19. On page 689 commences the testimony of F. W. Nixon and continues up to and including 693. Any relevant fact testified to by this witness could have been stated on one page of any proper statement.

20. On page 693 commences the testimony of Mark Hopkins and it continues up to and including a part of page 711. The testimony of this witness could have been stated in not to exceed three pages in any proper statement.

21. Then follows the testimony of P. S. Sowers that was taken on another trial, and this continues from page 711, in letters and regulations, all set forth verbatim, even with copies of forms on pages 742 and 743 and provisions of [fol. 568] revised statutes on page 744; other forms on page 745; certificates by Commissioners and Acting Com-

missioners, correspondence passing between the Register and Commissioner, powers of attorneys and non-mineral affidavits, with all their acknowledgments and subscriptions, coal declaratory statements, affidavits, receipts, acknowledgment of coal entry, regulations, all set forth verbatim, down to page 831.

22. Then follows the testimony of the witness Dunn, taken on a former trial, relative to the coal declaratory statements, cash entries, the ground upon which particular proceedings had been commenced in the Land Office, all set forth verbatim and at great length; proofs of publication and certificates of United States Land Office, notices, non-mineral affidavits, up to page 905 of said proposed statement. If any of this matter was material, such material matter could have been set forth in three pages of any proper statement.

23. Then follows the testimony of the witness Eli Taylor, a narrative of which is unnecessarily prolix, commencing on page 905 and running on for many pages.

24. Then follows the testimony of many other witnesses, all of which is set out at unnecessary and unreasonable length, and on page 959 follows the mortgage given by the Carbon County Land Company to the State of Utah. This is set forth in full and verbatim, whereas, any fact that was relevant could have been made to appear in three lines on any page of a proper statement.

25. The proceedings of the Carbon County Land Company are set forth on pages 966 to 973, whereas, the relevant fact, if any, contained within such statement, could have been stated in four lines on any page of a proper statement.

26. On pages 973 and 974 of the proposed statement is the communication of Horace F. Clark to the Commissioner of the General Land Office, entering his appearance in some land office proceeding relative to certain tracts of land.

The foregoing specifications are merely illustrative of the impropriety of the proposed statement and of the many violations of the rule which are to be found in said proposed statement.

The proposed statement does not condense or summarize the testimony to any material extent. It consists of 977 pages, whereas, the transcript of the reporter's notes contains only 1030 pages.

[fol. 569] These defendants therefore enter their protests and objections against the settlement of such a statement. Said defendants call attention to the fact that the duty of enforcing a compliance with the rule rests with the trial judge in the first instance, and to a few recent cases decided by the United States Supreme Court and the Circuit Court of Appeals of the Eighth and Tenth Circuits:

Barber Asphalt Paving Co., v. Standard Asphalt & Rubber Co., 275 U. S. 373; 72 L. Ed. 318.

Beck v. United States, 33 Fed. (2d) 107.

Tingley v. United States, 34 L. Ed. page 1. (Decision by the Tenth Circuit relative to a bill of exceptions.)

The rule relative to statements in equity is analogous to the rule relative to bills of exceptions in law cases.

6 Encyc. of Fed. Proc., Sections 2843 and 2844.

In the event this objection is overruled and the Court decides to settle this statement, the defendants, State of Utah, and the Independent Coal & Coke Company, desire to have inserted therein the statement that George P. Parker, Esquire, the duly elected, qualified and acting Attorney General for the State of Utah, appeared for the State of Utah, under and pursuant to authority vested in him and direction given to him by the Honorable George H. Dern, the duly elected, qualified and acting Governor of the State of Utah, and that the intervention of the State of Utah in this case was made under and pursuant to directions and authority given by said Governor, as required by Section 5682 of the Compiled Laws of Utah, 1917.

The State of Utah, by Geo. P. Parker, Attorney General of the State of Utah. Independent Coal & Coke Company, by M. E. Wilson, Its Attorney.

OBJECTION TO THE SETTLEMENT OF PROPOSED STATEMENT

Comes now the Carbon County Land Company, a corporation, and objects to the settlement of the proposed

[fol. 570] statement by the United States consisting of 977 pages in the above entitled cause, and hereby submits that the following parts of said condensed statement of evidence be stricken, and the following substitutions made.

1. Strike out statement of Mr. Lacy beginning on page 1, to and including pages 2, 3, 4 and 5, and down to the statement of Mr. Parker on page 5, and substitute therefor the following: If Mr. F. W. Nixon were called, he would testify that the Independent Coal & Coke Company paid taxes on the 1120 acres involved for the years 1920-1-2-3, totaling $39,949.53, and that through an arrangement with the State of Utah they had not paid taxes since the commencement of this action.

2. Strike out all of the testimony of Joseph A. Taff, commencing at page 8, to and including page 1355.

3. Strike out the original bill of complaint in equity No. 281 commencing on page 137, to and including page 177, and substitute therefor that the original bill of complaint in the Circuit Court of the United States, 8th Circuit, in and for the District of Utah, in Equity No. 281, was filed January 7, 1907.

4. Strike out the second amended complaint in equity No. 281, commencing at page 177, to and including page 215.

5. Strike out the general and several answers of Truth A. Milner, executrix of the last will and testament of Stanley B. Milner, deceased, Truth A. Milner, Samuel H. Gilson, and the Carbon County Land Company, a corporation, pages 216 to 314, inclusive.

6. Strike out pages 323 to and including page 343.

7. Strike out on page 344 after the words "Government's Exhibit 4," balance of said page, and all of pages 345 to 352, inclusive, and substitute therefor, Under date of April 22, 1921, United States Land Office certified to the State of Utah list No. 67 for use of the Agricultural College, section 26, township 12 South, Range 11 East, and the N. ½ of Section 35, Township 10 South, Range 11 East, containing 960 acres, which was duly accepted by the State.

8. Strike out pages 354 to 404 inclusive.

9. Strike out Exhibit 6, commencing on page 405 to and including page 408, and pages 411 to 417 inclusive, and substitute therefor, Under date of March 18, 1903, the Land Department certified to the State of Utah Agricultural Col-
[fol. 571] lege list No. 75, embracing the following lands shown on pages 409 and 410.

10. Strike out Exhibit 7, pages 418 to 427 inclusive.

11. Strike out all of Exhibits 8, 9, 10, 11 and 12, pages 427 to and including 462, and Exhibits 13 to 17, pages 462 to and including 497.

12. Strike out pages 498 to 513, inclusive, and substitute the following: The articles of incorporation of the Carbon County Land Company were filed March 10, 1903, Harrison E. Jenkins, B. D. Newman, A. C. Sadler, Edward E. Jenkins and Hiram E. Booth, all of Salt Lake City, being incorporators, all owning 10 shares of stock except Harrison E. Jenkins, Trustee, who held as trustee 88,950 shares; that on October 5, 1904, Stanley B. Milner, Archibald C. Milner and Clarence C. Milner were elected officers and directors of the aforesaid corporation and duly qualified.

13. This appellant moves that the testimony of Henry Wade, pages 514 to 533, inclusive, be rewritten and substantially reduced; that it contains many statements which are unnecessary to any of the parties herein involved upon this appeal.

14. This appellant moves that the testimony of J. E. Gibson, pages 533 to 547, inclusive, be rewritten and substantially reduced; that it contains many statements which are unnecessary to any of the parties herein involved upon this appeal.

15. Strike out pages 552 to 558, inclusive.

16. Strike out from Exhibit 20, page 567 to 570, inclusive, the testimonium clauses and acknowledgments, and substitute the fact that patent was dated February 10, 1920, and duly acknowledged.

17. Strike out of Exhibit 21 the note for $200,000.00, and the note for $256,428.00, and substitute therefor that on January 2, 1920, a like note was given in the sum of $200,-

000.00 and one for $256,428.00 by the Carbon County Land Company.

18. Move to strike out from Exhibit C, letter from W. A. Richards, Commissioner, to the Honorable Secretary of the Interior, pages 577 to 592, inclusive, such parts of said Exhibit which are not relevant to the case at bar.

19. Strike out pages 593 to 626, inclusive, and substitute therefor that the articles of incorporation of the Independent Coal & Coke Company were filed in the Secretary of State's office, Cheyenne, Wyoming, on the 22nd day of [fol. 572] October, 1906, and that thereafter on the 26th day of January, 1914, and on the 6th day of October, 1920, were amended; that the original incorporators and the number of shares for which they subscribed, and their residences are as follows:

Name	Residence	No. of shares
W. C. Orem	Salt Lake City, Utah	75,000
C. N. Strevell	Salt Lake City, Utah	50,000
Jas. H. Patterson	Salt Lake City, Utah	50,000
A. L. Pearse	London, England	1,000
Richard P. Morris	Salt Lake City, Utah	20,000
A. J. Orem	Boston, Mass.	74,000
L. H. Curtis	Salt Lake City, Utah	120,000
Frederick A. Sweet	Salt Lake City, Utah	110,500
Foster J. Curtis	Salt Lake City, Utah	8,250

That the corporation was originally incorporated for one million shares of the par value of $1.00 per share; that the remaining shares not subscribed for, 491,250, remained in the treasury; that on October 13, 1906, the capital stock was increased $150,000.00; that on September 23, 1920, the capital stock was increased to 2,500,000 shares of the par value of $1.00 each.

20. Strike out the acknowledgment of Exhibit E, page 625A.

21. That the testimony of M. E. Wilson, pages 628 to 665, is set forth in unnecessary detail, and should be rewritten, and that from the letters introduced during Mr. Wilson's testimony from Exhibit F, should be stricken the captions, all addresses, except the dates.

22. That the testimony of J. H. Tonkin, pages 665 to 689, is set forth in unnecessary detail, and does not strictly conform to the testimony as offered at the time of trial,

and should be re-written correctly and substantially reduced; that from Exhibit H introduced during the testimony of Mr. Tonkin, page 679, should be stricken the acknowledgments and other formal parts contained in all warranty deeds.

23. The testimony of the witness F. W. Nixon, commencing at page 689, and the testimony of Mark Hopkins, commencing at page 693, could have been stated in a much shorter and concise language.

24. The testimony of P. B. Sowers, commencing at page 711, taken on the first trial is set out verbatim, and contains many certificates, acknowledgments, affidavits and subscriptions on coal declaratory statements, affidavits, re-
[fol. 573] ceipts, and acknowledgments of coal entry regulations, which could be either stricken out or very materially reduced.

25. Then follows the testimony of the witness Dunn, taken on a former trial, relative to the coal declaratory statements, cash entries, the ground upon which particular proceedings had been commenced in the Land Office, all set forth verbatim and at great length; proofs of publication and certificates of United States Land Office, notices, nonmineral affidavits up to page 905 of said proposed statement. If any of this matter was material, such material matter could have been set forth in three pages of any proper statement.

26. Then follows the testimony of the witness Eli Taylor, a narrative of which is unnecessarily prolix, commencing on page 905 and running on for many pages.

27. Strike out pages 957 to 974, inclusive, and substitute therefor, That on the 2nd day of January, 1920, the Carbon County Land Company, a corporation, through its president and secretary, duly executed and made a mortgage to the State of Utah for the sum of $556,428.00, for all the lands embraced in plaintiff's bill of complaint herein, payable, $100,000.00 on or before January 2, 1930, $200,000.00 payable on or before January 2, 1940, and $256,428.00 on or before January 2, 1950, and that upon the payment of $54,-000.00 at any time, 640 acres may be withdrawn and released from this mortgage, which mortgage was duly approved by the Board of Directors of said corporation, and

accepted and approved by the State Land Commissioners of the State of Utah on March 1, 1920.

The foregoing matters moved to be stricken by this appellant and the illustrations of irrelevant matter contained in the proposed condensed statement of evidence, are in violation of the rules of the Circuit Court that the statement shall be a condensed statement of the evidence. The proposed statement has been reduced from the reporter's transcript of notes only 67 pages out of 1030 pages. The statement contains much evidence which by the pleadings in this action are admitted, and which evidence is irrelevant on appeal, and does not go to the merits of the controversy.

Wherefore, appellant, Carbon County Land Company, moves that the condensed statement of evidence be amended in the particulars herein set forth before it is settled.

Carbon County Land Company, by Samuel A. King,
Creighton G. King, Its Attorneys.

[fol. 574] ORDER SETTLING STATEMENT OF EVIDENCE.

The matter of the settlement of the evidence herein coming on to be heard the 18th day of January, 1930, upon the objections of the State of Utah and the Independent Coal & Coke Company, and the objections and motions to strike of the Carbon County Land Company, as hereinbefore set out (pages 978 to 991, inclusive), and counsel for the United States insisting that all of the matters objected to are pertinent and relevant in his opinion for the proper presentation of the government's case to the appellate court, it is

Ordered that the foregoing objections and motions to strike be and the same are overruled, except the two corrected upon the face of the record, to which ruling the intervener and the defendants excepted, and the said statement prepared and lodged herein is approved, settled and allowed as the statement of the evidence on the appeal of this case to the United States Circuit Court of Appeals for the Tenth Circuit as true and containing all the evidence taken upon the trial of said case, and is settled as the statement of the evidence in the said cause for use on such appeal.

Done at Salt Lake City, Utah, this 29th day of January, 1930.

Tillman D. Johnson, District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME IN WHICH TO FILE TRANSCRIPT OF RECORD ON APPEAL

Made and entered of record on January 29, 1930, as follows, to wit:

On the 29th day of January, 1930, comes the plaintiff by C. R. Hollingsworth, its United States Attorney, and good cause appearing therefore, it is ordered by the Court on motion of counsel for the plaintiff and on motion of counsel for the defendant, Carbon County Land Company, that the time allowed by law in which to file Transcript of Record on the appeal herein of the United States and on the cross appeal of the defendant, Carbon County Land Company, in the Circuit Court of Appeals for the Tenth Circuit be enlarged to and including the first day of March, 1930.

Dated and signed in open Court this 29th day of January, 1930.

Tillman D. Johnson, Judge.

[fol. 575] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Feb. 8, 1930

To the clerk of the above-entitled court:

You will please prepare and duly authenticate a transcript of the following portions of the record in the above entitled cause for the appeal of the plaintiff heretofore allowed to the United States Circuit Court of Appeals of the Tenth Circuit and submit the same to the said United States Circuit Court of Appeals of the Tenth Circuit:

1. Plaintiff's Amended Bill of Complaint.
2. Answer of Independent Coal & Coke Company.
3. Order permitting State of Utah to intervene.
4. Complaint in Intervention of the State of Utah.
5. Motion to vacate Order permitting State of Utah to intervene.
6. Order setting said motion for hearing on November 26, 1928.
7. Response of Plaintiff to application for State of Utah to intervene.

May 12, Stipulation to take from and substitute pages one and five and other pursuant to stipulation.

May 19, Given to August 1, 1928, to answer bill, but not to interfere with trial.

July 28, Set for trial Sept. 20, 1928. Stipulation to defendants to file respective answers. Order on same.

Sept. 1, Stipulation to defendants to Oct. 1, 1928, to file respective answers. Order on same.

Sept. 1, 1928, Order striking from trial calendar.

Sept. 29, Stipulation giving defendants Land Co. and Coal & Coke Company to Oct. 15, 1928, to answer.

Feb. 11, 1929, Order continuing from February 19 to April 1, 1929, for trial.

March 1, Stipulation to take depositions of Jos. A. Raft at San Francisco on March 18, 1929, filed.

[fol. 578] March 9, Amendment to answer U. S. to petition in intervention of State of Utah by substitution of certain pages and done by Clerk.

April 1, 1929, Trial begun, 4 U. S. Witnesses sworn, documentary evidence and stipulations and postponed until April 2nd.

April 2, Trial resumed. Ten witnesses sworn and examined and postponed until April 3rd.

April 3, Trial resumed, one witness sworn, arguments submitted and Decree ordered prepared by defendant attorneys per oral opinion.

Jan. 2, 1930, Time to settle condensed statement of evidence extended to Jan. 18, 1930, and reset.

Jan. 10, Notice and objections to condensed statement of evidence filed.

Jan. 18, Settlement condensed statement of evidence heard and taken under advisement. Objections to condensed state of evidence filed.

Jan. 29, Condenser statement of evidence defendant lodged.

Feb. 12, Notice to call up Carbon County Statement Evidence for settlement Feb. 15, 1930, filed.

Feb. 15, 1930, Hearing on statement of evidence continued.

Dec. 19, 1927, Time for defendants to answer amended complaint extended to Jan. 10, 1928.

Jan. 11, Stipulation extending time to answer to Feb. 1, 1928, filed.

Jan. 30, Stipulation extending time to answer to March 1, 1928, filed.

Feb. 27, Thirty days given from this day to defendants in which to answer or plead to amended bill.

Mar. 24, All defendants given to May 1, 1928, to plead.

Apr. 30, All defendants given to May 1, 1928, to plead.

May 12, Stipulation to take from and substitute pages one and five and order pursuant to stipulation.

May 19, Given to August 1, 1928, to answer bill, but not to interfere with trial.

Jul. 28, Set for trial Sept. 20, 1928. Stipulation to defendants to September 1, 1928, to file respective answers. Order on same.

[fols. 579 & 580] Sept. 1, Stipulation to defendants to Oct. 1, 1928, to file respective answers. Order on same.

Sept. 1, 1928, Order striking from trial calendar.

Sept. 29, Stipulation giving defendants Land Co. and Coal & Coke Company to Oct. 15, 1928, to answer.

Feb. 11, 1929, Order continuing from February 18, to April 1, 1929, for trial.

March 1, Stipulation to take depositions of Jos. A. Taft at San Francisco on March 18, 1929, filed.

March 9, Amendment to answer U. S. to petition in intervention of State of Utah by substitution of certain pages and done by Clerk.

April 1, 1929, Trial begun, 4 U. S. witnesses sworn; documentary evidence and stipulations and postponed until April 2nd.

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Jan. 2, 1930, Time to settle condensed statement of evidence extended to Jan. 18, 1930, and reset.

Jan. 10, Notice and objections to condensed statement of evidence filed.

Jan. 18, Settlement condensed statement of evidence heard and taken under advisement.

Objections to condensed state- of evidence filed.

Jan. 29, Condensed statement of evidence defendant lodged.

Feb. 12, Notice to call up Carbon County Statement Evidence for settlement Feb. 15, 1930, filed.

Feb. 15, 1930, Hearing on statement of evidence continued.

I further certify that the original citation on appeal in this cause is hereunto annexed and transmitted herewith.

In Witness Whereof, I have hereto subscribed my name and affixed the seal of said Court at Salt Lake City, in said district, this — day of February, in the year of our Lord nineteen hundred and thirty, and the 154th year of the Independence of the United States of America.

John W. Christy, Clerk, by W. B. Wilson, Deputy.
(Seal.)

[File endorsement omitted.]

[fol. 581] And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz.:

Appearances of counsel omitted in printing.

[fol. 582] In United States Circuit Court of Appeals, Tenth Circuit

Order Reassigning Cause—May 14, 1930

This cause comes on to be heard and thereupon, pursuant to written stipulation of counsel for the parties hereto herein filed.

It is now here ordered by the court that the assignment of this cause for hearing at the June Term, 1930, be and the same is hereby vacated and that said cause be reassigned for hearing at the October Term, 1930, of this court.

In United States Circuit Court of Appeals

Argument and Submission—Oct. 30, 1930

This cause came on to be heard and was argued by counsel, C. R. Hollingsworth, Esquire, appearing for appellant, and Mahlon E. Wilson, Esquire, appearing for appellees.

Thereupon this cause was submitted to the court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 248, January Term, 1931

No. 253, January Term, 1931

Mr. Charles R. Hollingsworth, United States Attorney (Mr. Seth W. Richardson, Asst. Attorney General, and Mr. Nat M. Lacy, were with him on the brief), for the United States.

Mr. George P. Parker, Attorney General of the State of Utah, for the State of Utah, Intervener.

Mr. Mahlon E. Wilson, for the Independent Coal & Coke Company.

Mr. Samuel A. King (Mr. Creighton G. King, was with him on the brief), for the Carbon County Land Company.

OPINION—January 14, 1931

[fol. 583] Before Lewis, Cotteral, and McDermott, Circuit Judges

McDERMOTT, Circuit Judge, delivered the opinion of the court.

This is the fourth appearance in appellate courts of a controversy over 5564.28 acres of coal land in Carbon County, Utah, the original litigation having been commenced on January 7, 1907. The earlier cases are Milner v. United States (C. C. A. 8) 228 F. 431, appeal dismissed, 248 U. S. 594; United States v. Carbon County Land Company (C. C. A. 8) 9 F. (2d) 517; certiorari granted and decision affirmed, Independent Coal & Coke Company et al. v. United States, 274 U. S. 640. These opinions set out so fully the facts connected with the early history of the controversy that a sketch thereof will suffice for this opinion.

In the Act of July 16, 1894 (28 Stat. 109) which provided for statehood for Utah, there is a floating grant to the State of many thousands of acres of unappropriated public lands. Provision was made for the selection, from time to time, of the lands so granted, but mineral lands were not subject to selection by the state, and were not included in the grant. Sec. 2318, Rev. Stat. (Comp. Stat. 1913, Sec. 4613); Independent Coal & Coke Company v. United States, 274 U. S.

640, 642; Milner v. United States, 228 F. 431, 439; Mullan v. United States, 118 U. S. 271, 276; United States v. Sweet, 245 U. S. 563.

In 1896 the legislature of Utah created a board of land commissioners and conferred upon it the control and management of such granted lands, and prescribed regulations for the selection and sale thereof. Laws of Utah, 1896, c. 80. Pursuant thereto, and between 1900 and 1903, Stanley B. Milner and his relatives and associates applied to purchase the lands in controversy, describing them as "grazing lands" and agreeing to release the state from its obligation to sell "if the said land shall hereafter be determined to be mineral in character." These applications were accompanied by affidavits that the applicants were well acquainted with the lands, and that they were non-mineral. The state board relied upon the truthfulness of the affidavits, and its President and Secretary made affidavit that the board had caused said lands to be examined, and that they were non-mineral. The state board then filed these documents with [fol. 584] the local Register and Receiver of the United States Land Office at Salt Lake City, who certified that the lands were not listed on the survey as mineral lands. Whereupon all papers were forwarded to the Commissioner of the General Land Office at Washington and in reliance thereon the lands were certified to the State of Utah between 1901 and 1904. The agreement of the Milners to purchase then attached, under which the Milners had ten years to pay the purchase price, $1.50 an acre. The purchasers then assigned to the Carbon County Land Company, a corporation in which Stanley B. Milner owned 99.95 per cent of the stock.

These lands were in fact underlain with valuable coal deposits, and are mineral lands within the statute. Mullan v. United States, 118 U. S. 271. There was no exposure of commercially valuable coal on any subdivision of the lands selected; and until the decision in 1911 of United States v. Diamond Coal & Coke Company, (C. C. A. 8) 191 F 786, affirmed in 233 U. S. 236, many lawyers and some courts believed that such exposure was an essential to the listing of lands as mineral. A rule promulgated by the Commissioner of the General Land Office and decisions of the Land Office were to that effect. However, since the decision of the Diamond Coal & Coke Company case, it is clear that the mineral

character of land may be established by any satisfactory evidence, including geologic inference. The proof in the Milner case, and in this case, leaves no doubt that the formation of the surrounding country, the outcroppings and development of contiguous territory, were such as to demonstrate the existence of valuable coal deposits under the lands involved, and that the Milners knew the facts indicating the presence of such minerals when they made their affidavits.

When these facts became known to the government, it brought an action (in 1907) against the Milners and their assignee, alleging that the lands were mineral in character and did not pass under the grant to the state: setting out that the certifications from the United States to the state had been procured by the fraudulent misrepresentations of the Milners; alleging that such certifications and all conveyances made thereunder were void, and that possession of the lands should be restored to the United States, and all clouds on the title of the United States should be removed. The [fol. 585] bill prayed specifically for the cancellation and surrender of the Milner contracts, and for general relief.

The State of Utah was not made a party. The records of the State Land Board disclose that the day after this suit was filed, Mr. Maynard, a Special Assistant to the Attorney General, appeared before the board and served upon it a copy of the bill of complaint, and stated that the bill only asked to set aside the Milner contracts and relieve the state from such contracts; that if the government won the suit, the title to the lands would be in the state, and that the government did not seek to deprive the state of its title. If these minutes correctly report Mr. Maynard's summary of the bill of complaint, he did not summarize accurately, for the bill alleges that the lands were mineral and were not granted to the state, that the certifications were procured by fraud and void, and that possession should be restored to the United States. He also read to the board the opinion in Williams v. United States, 138 U. S. 514, in which a similar suit was brought to recover lands from purchasers from the state, where certification to the state had been procured by the fraud of the purchasers. There, as here, the state was not made a party, and it was argued that the state, the holder of the legal title, was a necessary party. But the Supreme Court held otherwise, and said, at page 516:

"The state of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government."

The Milner case was tried in January, 1910. The evidence [fol. 586] disclosed the mineral character of the lands as above set out, thus presenting the same legal question as the Diamond Coal & Coke Company case, then on appeal; the trial court therefore awaited the decision in that case. When that case settled the law, the trial court in June, 1914, decreed the United States to be the "owner and entitled to the possession" of the lands involved; quieted its title against defendants and all claiming under them; decreed that defendants had no title or right to possession to any part of the property, and perpetually enjoined them from asserting any claim thereto.

This decree was affirmed in Milner v. United States (C. C. A. 8) 228 F. 431, the Court of Appeals concluding its opinion by holding.

"We find that the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States."

An appeal was taken to the Supreme Court of the United States, and dismissed for want of prosecution. 248 U. S. 594.

There was no further certification by the United States; the State of Utah was advised of the proceedings above related; yet in 1920, basing its right so to do upon the certifications determined to have been fraudulently secured, the State of Utah patented these lands to the Carbon County

Land Company, the same corporation (with some change in stock ownership) which had been found to be privy to the original fraud, and which had been enjoined from ever asserting any claim to these lands. The patent recites a consideration of $556,428, and is unconditional. The patentee paid this consideration by executing its notes for the full purchase price, $100,000 due in 10 years, $200,000 in 20 years, and the balance in 30 years. The notes bore no interest for five years from their date; thereafter, bore five per cent interest. The notes are secured by a mortgage on the lands so patented.

The Carbon County Land Company sold 1120 acres of the land to the Independent Coal & Coke Company, in October, 1920, in consideration of approximately $365,000 par value of the stock of the latter company, and the assumption of $112,000 of the indebtedness to the State of Utah. Between 1920 and 1924 the Independent Company paid $40,000 in taxes to the state. The Independent Company was not a participant in the fraud found in the Milner case, but was [fol. 587] fully advised of all the proceedings in court in the Milner case. Counsel for the Independent Company advised it that while the government could have successfully assailed the state's title on the record in the Milner case, if the action had been brought within six years after certification, that the Act of March 3, 1891, had barred that right. Counsel did, however, advise the Independent Company that should they determine to purchase this land, "they must take the chances of an adverse answer to these questions, which in my judgment are quite remote." The Carbon County Land Company and the Independent Company have been in possession since 1920.

On May 16, 1924, this action was brought against the Carbon County Land Company and the Independent Coal & Coke Company. The original bill is not in the record, but from the opinions of the courts, it appears that the decree of June 8, 1914, in the Milner case was set out, together with the 1920 patent and the conveyance to the Independent Company. The prayer was that the defendants be adjudged to hold whatever title they had in trust for the United States, and to convey same to the United States, and deliver up any muniments of title, and that defendants be enjoined from removing any coal from the land and from

intermeddling therewith. The trial court dismissed the bill on the ground that relief was barred by the statute of limitations. Act of March 3, 1891 (26 Stat. 1095). Upon appeal, this ruling was reversed (United States v. Carbon County Land Company (C. C. A. 8) 9 F. (2d) 518), the court holding that the bill was not one to cancel a patent or certificate, but was in the nature of a supplemental bill to obtain the benefits of the former decree. The State of Utah was not a party, but the court spoke of the state "as a mere conduit through which the lands were to be fraudulently acquired." The court held that—

"If the case stated in the bill should be made out, it would seem clear that the relief sought should be granted,—as to Carbon County Land Company, that it convey to appellant all of the lands title to which stood in its name when this suit was brought, and deliver to appellant any patent or other conveyance to it from the State; as to Independent Coal & Coke Company, that it make like conveyance of any of the lands conveyed to it, in which it acquired an interest with notice of appellant's rights, or without value."

[fol. 588] The Supreme Court granted certiorari, the State of Utah appearing amicus curiæ in support of the writ and in opposition to the United States. The decision of the Eighth Circuit Court of Appeals was affirmed. Independent Coal & Coke Company v. United States, 274 U. S. 640. Referring to the decree in the Milner suit, the Supreme Court said, at page 646:

"The decree in that suit is conclusive that the company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the state and its officials as agencies to procure the transfer. The decree not only established that the United States was the true and full owner of the land to the exclusion of the defendants, but perpetually enjoined them from setting up or making any claim to the lands. This and the issues of fact there resolved in favor of the United States and pleaded here, lead to the conclusion that none of the defendants, nor any claiming under them with notice, could by any legal device, however ingenious, acquire title from the state free from the taint of their fraud."

The court held that by the earlier decree, the United States was the owner of whatever rights the Milners ac-

quired under their contracts with the state, and that the Milners could not effectively surrender those rights to the state "unless the State stood in the position of a purchaser for value without notice." The court held that the Independent Company took subject to the equities of the United States and to the equities against the Carbon County Land Company, unless it affirmatively proved that it was a purchaser in good faith without notice.

When the case came back to the District Court, the bill was amended in form; the prayer is that the defendants be decreed to hold title in trust for the United States, that they be enjoined from trespassing on or removing coal from the property, and for any other relief to which plaintiff is entitled under the facts. The defendants answered, denying that the lands were mineral lands; denying that the decree of 1914 was binding on the State of Utah; alleging that the state had an unassailable title in 1920, through which defendants in good faith deraign their title. The Independent Company set out its payments for the land, for improve-
[fol. 589] ments and for taxes, and alleges that the United States is estopped now to challenge the title. Laches and limitations were also pleaded.

The State of Utah intervened, alleging that it was innocent of any wrong, and was without knowledge of the fraud of the Milners when the certifications from the government were originally procured; that the Milner decree was not binding on it; that the government was estopped by the representations of the Assistant Attorney General to the Land Board; that the government was barred by the statute of limitations from attacking its certifications; it sets up it mortgage on the lands, and prays that its title be quieted as against the United States; that its mortgage be decreed to be a binding obligation, and that the court decree that the lands have been subject to taxes since 1920. Replications were filed, admitting that the state had acted innocently in procuring the certifications in the first instance, but that when it undertook to sell the lands in 1920, it did so with full knowledge that the land was mineral and not subject to grant, and that the certifications had been procured by active misrepresentations. The government also filed an answer to the complaint in intervention of the state, in which the entire history of the certifications was pleaded, much as in the original bill of complaint filed in 1907 against the Mil-

8. Order vacating the Order permitting State of Utah to intervene.

9. Order granting permission for State of Utah to file Complaint in intervention.

10. Answer of Carbon County Land Company.

11. Replication of Plaintiff to answer of Independent Coal & Coke Company.

12. Motion of Plaintiff to strike Answer and Counterclaim of State of Utah.

13. Order denying motion last mentioned.

14. Replication of Plaintiff to Answer of Carbon County Land Company.

15. Answer of Plaintiff to Complaint in Intervention of the State of Utah.

16. Amendment to Answer of Independent Coal & Coke Company.

17. Amendment to Answer of Carbon County Land Company.

18. Reply of State of Utah to Counterclaim of Plaintiff.

[fol. 576] 19. Judgment and Decree.

20. Order made August 31, 1929, enlarging time to September 30, 1929, in which to settle statement of evidence.

21. Plaintiff's Petition for Appeal.

22. Order Allowing Plaintiff's Appeal.

23. Plaintiff's Assignment of Errors.

24. Citation on Appeal.

25. Order made September 27, 1929, enlarging time to October 31, 1929, in which to settle statement of evidence.

26. Order made September 27, 1929, enlarging time to October 31, 1929, in which to file the transcript of the record on appeal.

27. Order entered upon the Minutes on October 26, 1929, enlarging time to January 1, 1930, in which to file the transcript of the record on appeal.

28. Order made October 30, 1929, enlarging time to January 1, 1930, in which to settle statement of evidence.

29. Order entered upon the Minutes on December 27, 1929, enlarging time to January 31, 1930, in which to settle the statement of evidence and in which to file the transcript of the record on appeal.

30. Statement of Evidence filed after settlement on January 29, 1930.

31. Order made January 29, 1930, enlarging time to March 1, 1930, in which to file the transcript of the record on appeal.

32. Præcipe.

Dated at Salt Lake City, Utah, this 7th day of February, A. D. 1930.

C. R. Hollingsworth, United States Attorney. George H. Lunt, Assistant United States Attorney. E. C. Jensen, Assistant United States Attorney.

[File endorsement omitted.]

[fol. 577] IN UNITED STATES DISTRICT COURT

CERTIFICATE OF CLERK—Filed Mar. 1, 1930

UNITED STATES OF AMERICA,
District of Utah, ss:

I, John W. Christy, Clerk of the United States District Court for the District of Utah, do hereby certify that the foregoing pages numbered from one to 1121 inclusive contain a full, true, correct and complete copy and transcript of the record and proceedings designated in the præcipe for a transcript of the record in that certain suit or action numbered 8224 on the dockets of said Court, wherein the United States of America is plaintiff and Carbon County Land Company, a corporation, and Independent Coal & Coke Company, a corporation, are defendants, and State of Utah is Intervener, as full, true, correct and complete as the originals thereof, after comparison by me, now remain of record and on file in my office omitting the following papers and proceedings not specified in said præcipe to wit:

Dec. 19, 1927, Time for defendants to answer amended complaint extended to Jan. 10, 1928.

Jan. 11, Stipulation extending time to answer to Feb. 1, 1928, filed.

Jan. 30, Stipulation extending time to answer to March 1, 1928, filed.

Feb. 27, Thirty days given from this day to defendants in which to answer or plead to amended bill.

Mar. 24, All defendants given to May 1, 1928, to plead.

Apr. 30, All defendants given to May 1, 1928, to plead.

ners, and praying affirmatively that the title of the state be decreed to inure to the government; that its mortgage and all liens for taxes be cancelled, and that the government's title be quieted as against the state; that in the alternative, the certifications be cancelled, and for all other proper relief.

There was a trial, at which some of the evidence in the Milner case was re-introduced, together with additional testimony on both sides of the question of whether this land was known mineral land when certified. The Carbon County Land Company, and its grantees, are bound by the adjudication of the facts in the Milner case. We are of the opinion that the State of Utah is so bound; but if it were not, there is evidence in this case that the lands are mineral. The trial court made no finding thereon, but we have reviewed the evidence and it develops substantially the same facts reviewed by the Court of Appeals in the Milner case. We are in accord with the findings there made, and we find on this record that these lands were in fact mineral lands and not [fol. 590] subject to grant, and that the Milners knew the facts; although the President and Secretary of the State Board made affidavit that the lands were non-mineral, it appears they did not in fact know they were, and the government admits in its pleadings that the state was an innocent instrumentalty through which the Milners wrongfully procured these certifications.

The trial court entered a decree (1) that the State of Utah is, as against the United States, the owner of the lands in controversy, and (2) quieting the state's title as against the United States, and (3) that the 1920 patent to the Carbon County Land Company is void, and (4) that the decree determines no rights between the state and the Independent Coal & Coke Company. The United States appeals from the decree as a whole; the Carbon County Land Company appeals from that part of the decree adjudging the 1920 patent to be void.

For a great many years it has been the policy of the government to exclude mineral lands from ordinary entry. The grant for school purpose to the State of California, made in 1853, was held to exclude coal lands. Mining Company v. Consolidated Mining Company, 102 U. S. 167. The Act of July 1, 1864 (13 Stat. 343) made provision for the sale of coal lands at a price of not less than $20 an acre. See, also, Act of March 3, 1873. The Act of September 4, 1841 (5 Stat.

453) prohibited pre-emption of lands on which are situated "any known salines or mines." These early acts have been amended from time to time, but their legislative history leaves no doubt of adherence, for nearly a hundred years, to the policy of excluding known mineral lands from such general grants as was made to the State of Utah.

That the lands here involved were known mineral lands, and not subject to grant, has been proven in two trials, one in 1910 and again in 1929. That they are in fact coal lands is further attested by the sale by the state in 1920 for $100 an acre, and the sale of 1120 acres to the Independent Company at a price of approximately $400 an acre. That title thereto was procured from the government by material misrepresentations of facts has been twice proven and once adjudicated. The government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891 (Comp. Stat., Sec. 5114). A final decree that the government is the [fol. 591] owner of these lands, stands. The lower court decreed that the government did not own them; that its title had been lost by virtue of the limitation contained in the Act of March 3, 1891.

It has been conclusively determined, in the prior appeals of this particular case, that the six years limitation is not a bar to this action as far as it seeks to impress a trust on the titles of the Carbon County Land Company and the Independent Coal & Coke Company. Both the Court of Appeals and the Supreme Court have held that if the allegations of the bill were proven, that the government was entitled to the relief sought as to these defendants, unless an affirmative defense was established. The allegations have been proven; no affirmative defense has been established. The Carbon County Land Company could not possibly claim to be a purchaser in good faith, and the Independent Company knew all of the facts when it purchased, and assumed the risk as it was advised by its counsel that it must. The two companies hold the legal title to these lands. The Supreme Court, on the prior appeal, held in clear language that the government, upon proof of its averments and absent an affirmative defense, was equitably entitled to such title and to a transfer thereof to the government. These rights against the companies cannot be

denied because the state intervened to protect its mortgage interest. Nor would it avail the defendant companies if the title of the state had been unassailable prior to the 1920 patent. The state no longer holds the title; the title is held by the Carbon County Land Company, and its assignee, and the Carbon County Land Company was the original wrongdoer. This same argument met with a decisive answer by the Supreme Court on the prior appeal. Among other things the court said:

"So here the obligation, having its inception in the fraud which was established in the first suit, has been confirmed by the decree and persists as to every interest acquired by petitioners under the contracts with the state or which may be enjoyed by them as the fruit of their fraud, even though we assume for the moment that the title acquired by them could not have been challenged while in the hands of the state. * * * Even if the title acquired were through a new and independent contract and even though it were not in a strict sense proceeds of the earlier contracts, the relation of the Land Company and its equitable obligation to the [fol. 592] government, and its duty under the decree in the first suit, are such as to preclude the acquisition of any outstanding interest in the land in violation of the decree, free of that obligation and duty." Independent Coal & Coke Company v. United States, 274 U. S. 640, 648-649.

The government was not awarded the relief sought, and to which it was entitled, as to the two companies. Instead no adjudication was made as to the Independent Company; and as to the Carbon County Land Company, relief was granted that was not asked, and which was no relief at all as to the government. The denial of relief as to these two companies is contrary to the decision of the Supreme Court of the United States on the prior appeal, renders nugatory the decree of 1914, and is erroneous.

The state intervened and prays that its mortgage be adjudged a lien on the lands. It asserts that it was not a party to the Milner suit, and it was not; it concludes that it is not bound by the decree therein. But the conclusion does not follow. The state has parted with the title; the interest it now claims is a mortgage, taken from the Carbon County Land Company. As such mortgagee, it holds under that company; it cannot assert that it acquired its mortgage

without knowledge of the infirmity of its grantor's title, and is not therefore entitled to the protection afforded a bona fide purchaser; as a privy in title it is bound by the decree under familiar rules.

The argument for the state is predicated upon the assumption that it is an ancestor in title to the Carbon County Land Company, rather than a privy. It is doubtful if this is a fair assumption, since the state has seen fit, for purposes of its own, to part with its title unconditionally, and take back a mortgage. But assuming that the holder of a purchase-money mortgage has the same rights as one who has retained the title and merely contracted to sell, we come to the same conclusion. The government did not join the state, which then was innocent of intentional wrong, as a party defendant in the Milner case, but followed the procedure approved in Williams v. United States, 138 U. S. 514. But it did serve upon the state, through its Land Board, a copy of the bill of complaint the day after it was filed. That bill alleged the facts as to the misrepresentation, and further "that all of the aforesaid certified selec- [fol. 593] tions of the aforesaid lands should be declared null and void and of no effect, and all the conveyances by which any of the defendants claim right of possession or title to said lands herein described, should be set aside and held for naught, and complainant should be fully restored to the possession of said lands, and all clouds upon the title removed therefrom." It was also cited to the decision of the Supreme Court in the Williams case, which held that a state, in similar situation, might intervene, or pursue the more dignified course of disclaiming any interest in the controversy and conforming its subsequent conduct to the decree of the court. The State of Utah followed neither course; it did not intervene; neither did it conform. It is, therefore, our conclusion that, under the peculiar circumstances of this case and under the doctrine of the Williams case, the state is bound, in equity, by the decree of 1914.

The limitation of the Act of March 3, 1891, no more applies to the State of Utah than to the defendant companies. The action here is not to cancel a patent nor a certification. Although an alternative prayer of cancellation is contained in the government's cross-bill against the state, the primary relief sought against the state is the same as that against the companies—to impress a trust on such title

as it has in aid of the 1914 decree. That statute does not therefore bar this action.

That the state has no just claim to these lands is clear. It is in no sense a purchaser for value. It was an innocent conduit through which wrongdoers procured certifications by misrepresentation of facts. Mineral lands were not granted to the state. It is true that these 5564.28 acres stand charged to Utah, but the charge is easily removed, and non-mineral lands can be selected in lieu thereof. As a matter of fact, the state's position in this case is not entirely worthy of it. Asserting its own innocence, it seeks now to appropriate the benefits of the misrepresentation of others, and to secure valuable land which was not granted to it.

The law is clear that this cannot be done. One who is not an innocent purchaser for value, and who asserts a claim to property which it knows to have been procured by fraud, is as responsible as the original wrongdoer. In McIntire v. Pryor, 173 U. S. 38, 52, the court held:

"But whatever was done by Martha McIntire to this [fol. 594] property; whatever title she acquired was through the agency of her brother, and she is as chargeable with his frauds as if she had committed them personally. United States v. State Bank, 96 U. S. 30; Griswold v. Haven, 25 N. Y. 595; Reynolds v. Witte, 13 S. C. 5."

Mechem, in his work on Agency (2d Ed., Sec. 1993) states:

"But even though it should be held that the representations were ones which the agent was neither expressly nor by implication authorized to make, the principal may nevertheless be charged with responsibility for them if, after knowledge of their making, he voluntarily seeks to enforce or to gain or retain benefits flowing from the act or contract which was induced by such representation. The principal, in such a case, when he learns of the unauthorized representations, may disaffirm the transaction and escape liability. But if he voluntarily takes the benefits of the act or contract, he must ordinarily assume responsibility for the instrumentalities by which it was brought about."

And Williston, in his work on Contracts (Sec. 1518), states that a person defrauded may be granted relief against an innocent third person—

"Where, though the misrepresentations were not made by one acting as agent of the party benefited, the latter was or should have been cognizant of them, or was the cause of their being made, or gave no value for what he received, or gave no value until after he had learned of the misrepresentations."

To the same effect, see Goldsmith v. Koopman (C. C. A. 2) 152 F. 173; 27 C. J. 12.

When the state issued its patent in 1920 it asserted its title to these lands. It knew that the title had come to it by virtue of the misrepresentations of fact made by the Milners, and knew that such fact had been fully adjudicated; it had innocently vouched for those misrepresentations, and was the instrumentality without which the misrepresentations would have been of no avail; it parted with no value, and is not entitled now to reap the benefits of the wrong done the government. The District Court has jurisdiction, concurrent with that of the Supreme Court, over controversies between a state and the United [fol. 595] States. Ames v. Kansas, 111 U. S. 449. The state has submitted to the jurisdiction of the court by intervention. Without passing on the mooted question of whether the Act of March 3, 1891, applies to certifications, we hold, on the authority of Independent Coal & Coke Company v. United States, supra, that such statute does not bar an action brought to impress a trust in aid of a decree vesting title to the lands in the United States, and that the government is entitled to such relief against the intervener.

Counsel argued that the 1914 decree does no more than set aside the contracts of sale made to the Milners; that such was the sole purpose of that suit, and if the decree purports to do more, it is not responsive to the pleadings and is of no effect. If this is true, the Carbon County Land Company was free to buy this land again from the state, the day after the decree was entered, upon any terms. But it is not true; the decree speaks for itself and is not open to collateral attack. Furthermore, it is responsive to the bill. As has been seen, the bill of complaint in the original case was primarily directed at the fraud by which the cer-

tifications were procured; and the decree, by adjudging the government to be the owner of the lands, found that the certifications had been procured by fraud. The injunction is not against any claim of the defendants under their then existing contracts, but is against them asserting any claim under the certifications which they had fraudulently procured.

It is argued that the United States is estopped to assert title to these lands by the conversation had between the Special Assistant to the Attorney General and the Land Board of Utah, in 1907. While this conversation does not impress us as attempting to modify the bill of complaint which was the subject of the talk, it must be clear that no power resided in a Special Assistant to the Attorney General to convey reserved mineral lands to the State of Utah. Nor can it be said that estoppel arises because such conversation induced the state not to intervene; on the record in the Milner case and in this case, intervention would have availed the state nothing, and no detriment therefore resulted to the state. Furthermore, Congress has prescribed the method of disposing of mineral lands, and has reserved them from general grants. No employee of the United States has power to permit what Congress has forbidden.

[fol. 596] "* * * the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. Lee v. Munroe, 7 Cranch, 366; Filor v. United States, 9 Wall. 45, 49; Hart v. United States, 95 U. S. 316; Pine River Logging Co. v. United States, 186 U. S. 279, 291." Utah Power & Light Co. v. United States, 243 U. S. 389, 409.

Nor is there room for the application of the doctrine of laches; laches is not imputable to the government in a suit maintained to enforce its policy respecting public lands. Causey v. United States, 240 U. S. 399; Utah Power & Light Co. v. United States, supra. Moreover, there appeared to be no reason for the United States to act until Utah asserted its claim to these lands by issuing a patent.

Counsel argue that the Milners were not guilty of actual

fraud; that at most they misconstrued the law and the regulations. This may very well be true, and we have no disposition to impute to them any moral turpitude. But the fact remains that it has been adjudicated that, in a legal sense, they fraudulently obtained these lands from the United States. Counsel urge again the propositions which were advanced in the Diamond Coal & Coke Company, the Milner, and the Carbon Company cases. But these decisions are binding upon this court. The decree is reversed, with instructions to enter a decree in conformity with this opinion, including therein that the titles held by the Carbon County Land Company and the Independent Coal & Coke Company and the state are impressed with a trust in favor of the United States; that the defendant companies convey to the United States the titles which stood in their names when this suit was brought, failing which the decree should operate as such conveyance; the decree should operate as a cancellation of the lien of the mortgage held by the state and of any tax deeds or liens thereon; the title of the United States should be quieted; the defendants and the intervener, or any one claiming under them, should be enjoined from asserting any claim to the title or possession of the premises; it should provide for an accounting by the defendant companies for the use of the lands since 1920; if upon that accounting there is a [fol. 597] charge made to the Independent Coal & Coke Company for the value of any coal recovered, there should be credited against that charge the reasonable cost of the mining thereof, since that company did not participate in the original wrong and acted in good faith and upon the advice of reputable counsel. The costs on the appeal in No. 248 are taxed to the defendant companies; in appeal No. 253 to the Carbon County Land Company.

Reversed and Remanded with Instructions.

In United States Circuit Court of Appeals

Decree.—Jan. 14, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court, in this cause, be and the same is hereby reversed; that this cause be and the same is hereby remanded to said District Court with instructions to said court to enter a decree in conformity with the opinion of this court, including therein that the titles held by the Carbon County Land Company and the Independent Coal and Coke Company and the State of Utah are impressed with a trust in favor of the United States of America; that the Carbon County Land Company and the Independent Coal and Coke Company convey to the United States of America the titles which stood in their names when this suit was brought, failing which the decree shall operate as such conveyance; that said decree shall operate as a cancellation of the lien of the mortgage held by the State of Utah and of any tax deeds or liens thereon; that the title of the United State of America be quieted; that the Carbon County Land Company, the Independent Coal and Coke Company and the State of Utah, and anyone claiming under them, be enjoined from asserting any claim to the title or possession of the premises; that said decree provide for an accounting by the Carbon County Land Company and the Independent Coal and Coke Company for the use of the lands since 1920, and direct that, if [fol. 598] upon that accounting there is a charge made to the Independent Coal and Coke Company for the value of any coal recovered, there be credited against that charge the reasonable cost of the mining thereof.

It is further ordered, adjudged and decreed by this court that United States of America, appellant, have and recover of and from Carbon County Land Company, a corporation, and Independent Coal and Coke Company, a corporation, its costs herein and have execution therefor as at law.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MANDATE

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the District of Utah, Greeting:

Whereas, lately in the District Court of the United States for the District of Utah, before you, or some of you in a cause between United States of America, Plaintiff, and Carbon County Land Company, a corporation, et al., Defendants, No. 8224 Equity, the decree of the said District Court in said cause entered on June 11, 1929, was in the following words, viz:

It is therefore ordered, adjudged and decreed as follows, to-wit:

1. That the State of Utah, Intervener herein, is, as against the plaintiff, The United States of America, the owner and entitled to the possession of the following described property:

Northwest quarter and southeast quarter of Section 22; east half of Section 27; south half of Section 33; all of Section 34; south half of Section 35, Township 12 South, Range 11 East, Salt Lake Meridian, containing 1920 acres.

North half of Section 26, Township 12 South, Range 11 East, Salt Lake Meridian, containing 320 acres.

North half of Section 33, Township 12 South, Range 11 [fol. 599] East; Lots 1, 2, 3 and the southeast quarter of the southeast quarter of Section 3, Township 13 South, Range 11 East, Salt Lake Meridian, containing 477.04 acres.

All of Section 1 and 3; north half of Section 10; north half of Section 11; north half of Section 12, Township 13 South, Range 10 East, Salt Lake Meridian, containing 2244.24 acres.

Southeast quarter of Section 12; east half of the northeast quarter of Section 14; Township 13 South, Range 10 East; Lot 1; northeast quarter; northeast quarter of the northwest quarter; north half of the southeast quarter; southeast quarter of the southeast quarter of Section 7, Township 13 South, Range 11 East, Salt Lake Meridian,

containing 603 acres, making a total amount of 5564.28 acres; all situated in the county of Carbon, State of Utah.

2. That the title of the State of Utah to the said described lands be and the same is hereby quieted as against any and all claims of the United States of America, or any person or persons claiming through or under said United States of America; and the said United States of America has no right, title or interest or right of possession in or to the premises above described or any part thereof, and that whatever claim the United States of America ever had, if any, against the State of Utah for said lands, or any part thereof, to set aside the certifications of said land by the United States of America to the State of Utah is hereby adjudged to have been barred prior to the commencement of this action by Section 8 of the Act of Congress of March 3, 1891.

3. And it is further ordered, adjudged and decreed that the State Patent dated February 10, 1920, issued by the State of Utah to the Carbon County Land Company be and the same is hereby adjudged to be void and of no effect.

4. And it is further ordered, adjudged and decreed that this decree shall not have the effect of adjudicating or determining any rights or liabilities as between the intervener, the State of Utah, and the defendant, Independent Coal & Coke Company.

[fol. 600] Done in open Court this eleventh day of June, A. D. 1929.

As by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals, Tenth Circuit, by virtue of an appeal by United States of America agreeably to the act of Congress, in such case made and provided, fully and at large appears;

And Whereas, at the January Term, in the year of our Lord one thousand nine hundred and thirty-one, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from said District Court and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said

District Court, in this cause, be and the same is hereby reversed; that this cause be and the same is hereby remanded to said District Court with instructions to said court to enter a decree in conformity with the opinion of this court, including therein that the titles held by the Carbon County Land Company and the Independent Coal and Coke Company and the State of Utah are impressed with a trust in favor of the United States of America; that the Carbon County Land Company and the Independent Coal and Coke Company convey to the United States of America the titles which stood in their names when this suit was brought, failing which the decree shall operate as such conveyance; that said decree shall operate as a cancellation of the lien of the mortgage held by the State of Utah and of any tax deeds or liens thereon; that the title of the United States of America be quieted; that the Carbon County Land Company, the Independent Coal and Coke Company and the State of Utah, and anyone claiming under them, be enjoined from asserting any claim to the title or possession of the premises; that said decree provide for an accounting by the Carbon County Land Company and the Independent Coal and Coke Company for the use of the lands since 1920, and direct that, if upon that accounting there is a charge made to the Independent Coal and Coke Company for the value of any coal recovered, there be credited against that charge the reasonable cost of the mining thereof.

It is further ordered, adjudged and decreed by this [fols. 601 & 602] court that United States of America, appellant, have and recover of and from Carbon County Land Company, a corporation, and Independent Coal and Coke Company, a corporation, its costs herein and have execution therefor as at law. January 14, 1931.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles E. Hughes, Chief Justice of the United States, the 19th day of February, in the year of our Lord one thousand nine hundred and thirty-one.

Costs of Appellant: Clerk, $164.40; Printing Record, $769.36; Attorney, $20.00; Total, $953.76.

Albert Trego, Clerk of the United States Circuit Court of Appeals, Tenth Circuit. (Seal U. S. Circuit Court of Appeals, Tenth Circuit.)

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 603] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 18, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is advanced and assigned for argument on Monday, October 5th next after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 604] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1931

Case No. 48

CARBON COUNTY LAND COMPANY, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

STIPULATION

It is hereby stipulated by and between the Carbon County Land Company and the United States of America, parties to the above entitled action, that the printing of the record transmitted from the Tenth Circuit Court of Appeals in said cause, is hereby waived.

And it is further stipulated and agreed that said cause may be heard, argued and considered upon the record prepared and printed by the State of Utah, Petitioner, v. United States of America, respondent, No. 42, October Term, 1931, which record embraces and contains all of the pleadings, facts and proceedings necessary for the determination of this action, and said record so printed and filed by the State of Utah may be considered for all purposes as the record in this case; it being expressly understood by the parties hereto that the printing of the record in this cause by the Carbon County Land Company would simply duplicate in part the record printed by the State of Utah. This stipulation may be printed and included in the record.

Dated this 9th day of June, 1931.

Samuel A. King, Attorney for Carbon County Land Company, Petitioner. Claude R. Branch, Acting Solicitor General, on behalf of the United States of America, Respondent.

Endorsed on cover: File No. 35,771. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 42. State of Utah, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed April 6, 1931. File No. 35,771.

FILE COPY

APR.

IN THE

Supreme Court of the United States

October Term, 1931

No. [redacted] 412

STATE OF UTAH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND SUPPORTING BRIEF

GEORGE P. PARKER,

Attorney General of the State of Utah.

MAHLON E. WILSON,

Attorney for Independent Coal & Coke Company.

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act, honest when done, can be made fraudulent by a retroactive application of a rule adopted ten years after the commission of the act.

JURISDICTION OF THIS COURT: This application for a writ of certiorari is made under Section 240 of the Judicial Code, (U. S. C. Title 28, Sec. 347.) The land involved consists of 5564.28 acres situated in Carbon County, Utah. In view of agreements attempted by various parties, as they are shown by the record, it is fair to state that the approximate value of this land is $100 per acre, or $556,428. The questions of law involved are not only of great but also of transcendent importance. If the decision of the Circuit Court of Appeals is sustained, then there is no security or repose in the title to a great portion of the land in the State of Utah, and the "benign influence" (U. S. v. Winona, 165 U. S. 463) of the Statute of 1891 has ceased to operate, and the attempted purchase of land in Utah is indeed precarious.

The decree of the Circuit Court of Appeals is final. Your petitioner's rights are cancelled and annulled, and nothing remains for determination as against your petitioner.

STATEMENT OF FACTS.

Under and pursuant to the floating grant contained in the Enabling Act of July 16, 1894 (28 Stat. 109), the 5564.28 acres of land involved in this controversy were selected by the officers of the State of Utah, and, after a due and regular investigation by the Commissioner of the General Land Office of the United States at Washington, and with the approval of the Secretary of Interior, the titles to said lands were certified to the State of Utah between the years 1901 and 1904, and one Stanley B. Milner, and other persons associated with him, entered into a contract with the State of Utah for the purchase of said lands at the price of $1.50 per acre. Said contract of purchase was then assigned to the Carbon County Land Company, a corporation in which Stanley B. Milner owned approximately all of the capital stock.

At the time of the purchase of said lands, and according to the rule then being enforced by the General Land Office of the United States, said lands were classified as non-mineral in character because there were no exposure of any coal hav-

ing a commercial value on any sub-division of the lands selected and certified, but because of a decision of this Court made in 1914 (Diamond Coal & Coke Co. v. United States, 233 U. S. 236), said lands were found to be mineral in character in 1914. (See Milner v. U. S., 228 Fed. 431; 248 U. S. 594.)

The United States commenced an action on January 7, 1907, against the said Milner and the Carbon County Land Company for the cancellation of said contracts of sale, alleging that the lands were mineral in character and did not pass under the grant to the State, and that the certifications from the United States to the State of Utah had been procured by fraudulent misrepresentations of the Milners, and that by reason thereof the certifications made by the United States were void, and that the possession of the lands should be restored to the United States, and that all clouds on the title of the United States should be removed.

This suit was tried in January, 1910, but was not determined by the Trial Court until June, 1914, a short while after the final decision of this Court in the case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, decided April 6, 1914. The decree of the Trial Court in the Milner case decreed the United States to be the owner and entitled to the possession of the lands involved and quieted its title against the defendants and their privies to that suit and perpetually enjoined the defendants from thereafter asserting any claim to said lands. This decree was affirmed by the Circuit Court of Appeals November 15, 1915. (228 Fed. 431.) Appeal dismissed. (248 U. S. 594.)

The State of Utah was not made a party to said Milner suit, and, of course, could not have been made a party, because the Trial Court had no jurisdiction to determine the rights of the State of Utah in said litigation without the consent of the State of Utah. It might have intervened, but it did not—perhaps because the Special Assistant to the Attorney General who commenced and carried on the Milner suit appeared before the State Land Board of the State of Utah on the day following the institution of said Milner suit, and assured the State Land Board that the United States sought nothing further by said suit than to set aside the Milner contracts and relieve the State from such contracts, and

that if the Government won the suit the title to the land would be in the State, and that the Government did not seek to deprive the State of its title. (R. 245-246). (See stipulation, R. 259)

No further proceedings or transactions were had with reference to said land until the year 1920, when the State of Utah issued its patent, bearing date February 10, 1920, to the Carbon County Land Company, conveying said lands to said grantee for the sum of $556,428, to be paid as follows: $100,000 on or before January 2, 1930; $200,000 on or before January 2, 1940, and $256,428 on or before January 2, 1950. The respective amounts of this indebtedness were evidenced by promissory notes, which were secured by a mortgage made covering the land. (R. 366-369; R. 556-559). All of the notes bear interest on and after January 2, 1925, at the rate of five per cent. until maturity and eight per cent. thereafter until paid.

In October, 1920, the Carbon County Land Company sold 1120 acres of the land in question to the Independent Coal & Coke Company, a corporation organized and existing under the laws of the State of Wyoming but operating coal mines in Utah in the vicinity of the lands in question. The Independent Coal & Coke Company gave to the Carbon County Land Company approximately 365,000 shares of its capital stock, having a par value of $365,000, and an actual value, according to the record, of at least 60c per share, and assumed an indebtedness for $112,000 standing against the 1120 acres of land in favor of the State of Utah. The Independent Coal & Coke Company and the State of Utah entered into an agreement whereby the State of Utah was to convey the 1120 acres to the Independent Coal & Coke Company immediately upon the said Company paying to the State the said sum of $112,000. (R. 391, 407.) (See Deed, R. 417)

The Independent Coal & Coke Company entered into the possession of the 1120 acres of land and paid approximately $40,000 in taxes to the State prior to the institution of this suit in 1924. (R. 99)

On May 16, 1924, the United States brought this action against the Carbon County Land Company and the Independent Coal & Coke Company. The bill sought to have the Carbon County Land Company and the Independent Coal &

Coke Company declared constructive trustees of the land involved and to have the parties ordered to reconvey the title to the land to the United States. The Trial Court dismissed the bill on the ground that the relief was barred by the Statute of Limitations. Upon appeal this ruling was reversed. (United States v. Carbon County Land Co., 9 Fed. (2d) 517.)

This Court then granted a writ of certiorari and permitted the State of Utah, your petitioner, to appear in support of the writ. The decision of the Eighth Circuit Court of Appeals was affirmed by a divided court. (274 U. S. 640.)

On the return of the mandate of this Court to the United States District Court for the District of Utah, the original bill of complaint was amended. The State of Utah then intervened and set up its mortgage, and prayed that its title be quieted as against the United States.

The United States, after making unsuccessful objections to this intervention on the part of the State, then filed its answer to the complaint in intervention, and also its counter-claim against the State of Utah. (R. 68)

COUNTER-CLAIM OF UNITED STATES: In this counter-claim, it claimed the title to the land, and prayed, among other things, that the Court adjudge and decree that the certifications of said land "so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up to be cancelled, and that the Court, by its decree, cancel and annul the same." (R. 84-85)

REPLY OF STATE: To this counter-claim, the State of Utah replied, denying that in substance the lands were of a known mineral character on May 9, 1904, or at any time prior thereto, and alleging that said lands were classified as non-mineral, and that never, at any time until the commencement of the action on January 8, 1907, had the United States pretended or claimed that said lands were of a known mineral character. Said reply re-affirmed the allegations contained in its complaint in intervention, and finally alleged that the cause of action set forth in the counter-claim of the United States was barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which in substance provides that all actions to vacate or annul patents shall be

commenced within six years after the date of the issue of such patents. The State of Utah then prayed "that the United States take nothing by reason of said counter-claim; that said counter-claim be dismissed for want of equity, and * * * that the lands described in said counter-claim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States" and for general relief. (R. 89)

Upon a hearing the Trial Court entered a decree that the State of Utah is, as against the United States, the owner of the lands in controversy. The Circuit Court of Appeals, by its opinion and its decision, reversed that decree, holding that it should operate as a cancellation of the lien of the mortgage held by the State and of any tax deeds or liens thereon, and that the title of the United States should be quieted, and that the State, or anyone claiming under it, should be enjoined from asserting any claim to the title or possession of the premises.

SUBSTANCE OF DECISION OF COURT OF APPEALS.

The holding of the Circuit Court of Appeals, in reversing the judgment of the District Court, is predicated upon the following propositions: (Opinion R. 592)

1. That the lands here involved were known mineral lands and not subject to grant by the United States.

2. That the title thereto was procured from the Government by material misrepresentations of facts.

3. That the Government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891.

4. That the six-year limitation prescribed by the statute is not a bar to this action as far as it seeks to impress a trust on the titles held by the Carbon County Land Company and the Independent Coal & Coke Company, and that the two companies hold the legal title to these lands.

5. That the decree of the Trial Court is contrary to the decision of this Court in that it granted no relief to the Government as against the Carbon County Land Company or the Independent Coal & Coke Company.

6. That because the State had parted with its title, and its interest was thereafter represented by a purchase money mortgage, then as the mortgagee therein it held under the Carbon County Land Company, and that the State of Utah was a privy in title to the Carbon County Land Company, and was therefore bound in equity by the decree of 1914, entered in a suit to which the State was not a party and to which it could not have been made a party without its consent.

7. That although the cross-bill of the United States against the State prays for a cancellation of the certifications made by the Government, still the primary relief sought against the State is the same as that against the Companies, viz: to impress a trust on such title as it has, in aid of the 1914 decree, and the statute therefore does not bar the action.

8. That the State has no just claim to these lands, and that the State's position in this case "is not entirely worthy of it". (Quoting Court's opinion.) (R. 593)

9. That the decree of 1914 does not merely set aside the contract of sale made between the State and the Milners, but prevents the Milners and their successor, the Carbon County Land Company, from asserting any claim under the certifications which they have fraudulently procured.

10. That the United States is not estopped by reason of the representations of the Special Assistant Attorney General of the United States, made to the State Land Board in 1907; that only the Congress of the United States could provide for the disposition of the lands of the United States.

11. That the United States was not guilty of laches because there was no reason for it to act until the State of Utah asserted its claim to these lands by issuing a patent.

12. That while the Milners were not guilty of actual fraud, and no moral turpitude is imputed to them, still in a legal sense the lands were fraudulently obtained, and that the decision involved in the original suit made in 1914 is binding upon the Court of Appeals.

SPECIFICATION OF ERRORS.

Your petitioner assigns and specifies error as follows:

1. That the Circuit Court of Appeals erred in holding that as to your petitioner, the State of Utah, the land involved were known mineral lands, and erred in ignoring the fact that said lands were by the standard of law, in force at the time of the certification by the United States to the State of Utah, non-mineral in character, and erred in failing to apply the standard of law which existed at the time of the certifications were made by the United States to the State of Utah, and for the same reason erred in finding that there was a material misrepresentation of the facts as to the character of said land.

2. That the Court of Appeals erred in holding that the Government attacked the proceedings by which the certifications were procured by an action in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891,—it being conceded that the attack made by the Government was merely upon Milner and his corporation and not upon any title held by the State of Utah.

3. That the Court erred in holding that the six-year limitation prescribed by the statute can be avoided by an action seeking to impress a trust when, as a matter of fact and law, it cannot be avoided by an action which seeks to vacate and annul a patent or a certification.

4. That the Court erred in failing to appreciate that the impressment of a constructive trust, accompanied with a reconveyance of the title to land, is in all respects the legal equivalent of and necessarily includes the vacation and annulment of the patent, certification, or other muniment of title, and in failing to appreciate that the creation of a constructive trust by the court, as against a grantee, contains within it, as an essential prerequisite to its existence, the vacation and and annulment of the grant in whatsoever form.

5. That the Court erred in failing to appreciate that the Statute of Limitations is a meritorious defense and the prime essential and basic foundation to every valid title, and that such statute was enacted for the purpose of creating a right, accompanied by its resulting repose and security, rather than

for the mere purpose of barring one form of a remedy and allowing the right to be destroyed by adopting another mere form.

6. That the Court erred in failing to give effect to the interest of the State of Utah in the land involved, which interest was the entire purchase price of said land; and erred in failing to appreciate that the State of Utah was still in law seized of the land involved, to the same extent as it has been at any time since the certifications were made by the United States.

7. That the Court erred in holding that the State's rights in the land came from or were held under the Carbon County Land Company, and in failing to recognize that the State's rights in said land came from the United States, under and pursuant to the Enabling Act of July 16, 1894; and erred in concluding that the State of Utah was a successor to the Carbon County Land Company or a privy to that Company; and erred in failing to appreciate that the State was charged by the United States to the full extent of the acreage involved, in partial satisfaction of the grant made in said Enabling Act.

8. That the Court erred in holding that the State is "under the peculiar circumstances and under the doctrine of the Williams case, bound in equity" by the decree of 1914, when it is conceded that not only was the State not a party to the suit in which that decree was made, but that it could not have been made a party without its consent.

9. That the Court erred in failing to appreciate that the State as well as the United States is clothed with and entitled to the immunities and privileges of a sovereignty, and that while the United States can convey its lands only by means of the rules provided by its Congress, the State of Utah can convey its lands only by means of the rules provided by its legislature, and that neither of the sovereignties can do more or less than follow its law.

10. That the Court erred in holding that the primary relief sought against the State is to impress a trust on the title to the land involved, in aid of the 1914 decree, because no trust could be nor was any imposed upon the State of Utah by the Circuit Court of Appeals. So far as the State is con-

cerned, the decree of that court goes no farther than to cancel and annihilate the State's interest in the land.

11. That the Court erred in holding that the State has no just claim to these lands, and in intimating that the State's position "is not entirely worthy of it", because it appears from the record that these certifications made by the United States to the State have for more than twenty-five years been treated by both the State and the United States as a partial satisfaction of the grant made in the Enabling Act.

12. That the Court erred in holding that the decree of 1914 had any other or greater effect than to annul the interest of Milner and the Carbon County Land Company as it existed at the time of the entry of that decree; and erred in assuming that this Court intended to hold that the Carbon County Land Company could not, by means of a new, fair and lawful transaction, buy this land from the State if it was the owner thereof, or from any other person who might own said land.

13. That the Court erred in holding that the United States was not estopped by reason of the representations of the Special Assistant Attorney General who was conducting the Milner suit in behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit; that now to claim that the State is concluded by the decree entered in the Milner suit permits the United States to reap an unjust advantage from the misconduct of its representative.

14. That the Court erred in holding that the United States was not guilty of laches, because, regardless of its legal effect and legal consequence, the conduct of the United States in suffering the long delay before commencing its action of 1924 was from any standpoint inexcusable and highly detrimental to both the State and to every citizen thereof. This question might well have been settled years ago had the United States assumed a different attitude.

15. That the Court erred in applying to the conduct of the Milners between the years 1901 and 1904, which was in accord with the then existing legal standards, another legal standard not created or conceived until 1914, and by this error in effect, through a retroactive application of the new standard, transformed an honest act into a fraudulent one.

REASONS FOR ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits that the present case is one in which this Court should issue a writ of certiorari for the following reasons:

1. The real controversy is between the State of Utah, your petitioner, and the United States. Because of the sovereign character of such parties and because of the provisions of the Constitution providing for the original jurisdiction of this Court in suits where a State is a party, such a controversy should not be determined without a review by this Court. No other Court than this Court could acquire jurisdiction of a controversy between the United States and your petitioner without the consent of each and both of said parties. That consent has been given by the United States bringing this suit and by the State voluntarily intervening in such suit, and particularly by the United States filing its counterclaim against the State and the State replying thereto. Therefore, considering only the character of the parties involved in the real controversy, it is submitted that the judgment complained of should be reviewed.

2. But, disregarding the character of the parties, and looking only to the character of the questions involved, the great and transcendent public importance of the decision of the Circuit Court of Appeals, it is submitted, compels a review by this Court because the decision of said Court makes uncertain and insecure the titles to real estate, especially within the State of Utah and throughout all the public land States. All titles rest more or less upon a repose resulting from the Statute of Limitations, and when once it is held that Section 8 of the Act of March 3, 1891, can be avoided by an action seeking to establish an implied or constructive trust, as contradistinguished from an action for formal annulment of a patent, then the purpose of that statute has failed, or has ceased to operate, and the title to land has become insecure and its acquisition fraught with great danger. The public importance of such a question cannot be over-estimated.

3. The decision of the Court of Appeals, holding that the State of Utah is bound by the decree entered in favor of the United States and against the Carbon County Land Company, et al., in the year 1914, is in conflict with the decisions of this Court and in conflict with the general law, because

IN THE

Supreme Court of the United States

October Term, 1931

No.....

STATE OF UTAH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of Utah complains of the decree of the United States Circuit Court of Appeals of the Tenth Circuit entered in that court on January 14, 1931, and respectfully petitions for a writ of certiorari to review the same as against the United States of America, respondent above named. (R. 592)

EFFECT OF DECREE: Said decree, when considered in connection with the opinion of the Circuit Court of Appeals, cancels and annuls all right, title and interest of your petitioner in the land which is the subject of this litigation. As a precedent, it establishes: (1) that a state may be bound in equity by decree entered in a suit to which that state was not and could not have been made a party, without its consent; (2) that a statute of limitations barring actions to vacate or annul grants of land made by the United States, enacted for the purpose of making safe and secure the title to such lands, may be avoided by an action commenced to impress such land with a constructive trust, and letting the decree therein have the effect of a reconveyance; (3) that an

the State was not a party to the suit which resulted in said decree, and because the State could not have been made a party to such suit without its consent.

Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339;
Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229;
Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137;
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209;
Cadwallader v. Harris, 76 Ill. 370;
State v. Cincinnati Tin Co., 66 Ohio St. 182; 64 N. E. 68.

These cases hold in substance that the record in the Milner suit does not estop the State and will not be evidence against it for any purpose touching the merits of its claim.

4. The decision of the Court of Appeals, in holding that Section 8 of the Act of March 3, 1891, does not apply in favor of the State because this suit is one to have the land impressed with a constructive trust, or because it is in aid of a former decree, is untenable and in conflict with the great weight of authority, and in conflict with the applicable decisions of this Court and in conflict with the general law, because this statute of limitations gives a right meritorious in character, and its application does not depend upon the character of the remedy adopted or the nature of the forum chosen, and the rights created by it cannot be sacrificed to any mere form of remedy selected by the complainant.

United States v. Whited, 246 U. S. 552; 62 L. Ed. 879;
United States v. Winona, 165 U. S. 463; 41 L. Ed. 789;
United States v. Oregon Lumber Co., 260 U. S. 290; 67 L. Ed. 261;
United States v. Chandler-Dunbar Co., 209 U. S. 447; 52 L. Ed. 881;
Robinson v. Hook, 4 Mason, 139; 20 Fed. Cas. 1017 (1826).

(Opinion of Justice Story: Statute of Limitations bar against constructive trusts.)

Elmendorf v. Taylor, 10 Wheat. 152; 6 L. Ed. 289;
Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 417.

(Opinion by Justice Kent.)

New v. Smith, 86 Kan. 1; 119 Pac. 380.

(Substance and not form of action decisive in the application of a statute.)

Campbell v. Dick, 157 Pac. 1062 (Okla.);
Newsom v. Board, 103 Ind. 526; 3 N. E. 163;
Speidel v. Henrici, 120 U. S. 377; 30 L. Ed. 718;
Carroll v. Green, 92 U. S. 509; 23 L. Ed. 738.

These authorities, it is believed, establish the proposition that a statute of limitations, although in form barring a remedy, in substance creates a right, the existence of which cannot be avoided by choosing one form of a remedy as contradistinquished from another. The application of the bar created by the statute is not prevented by the fact, if it be a fact, that the proceeding is in aid of a former decree, where such proceeding brings in a new party.

Davey v. Dodge, 213 Fed. 722 (8th C. C. A.)

(It is difficult to see how there can be an affirmation of the certifications if such affirmation is immediately followed with the creation of a constructive trust, accompanied by an order for reconveyance. See opinion of Circuit Judge Carland in Davey v. Dodge, 213 Fed. 729.)

5. It is apparent from the opinion of the Circuit Court of Appeals rendered in this case, and the opinion rendered by the same Circuit Court of Appeals in the case of United States v. Amalgamated Sugar Company, decided March 5, 1931, a copy of which is hereto attached, that said Circuit Court of Appeals was in grave doubt or, to quote from one of the opinions, "had serious misgivings" about the determination of the question of law as to the application of Section 8 of the Act of March 3, 1891, and that "if this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action". (Quoting from Circuit Judge McDermott's opinion in the Amalgamated case.)

6. The decision of the Circuit Court of Appeals has misinterpreted the action as between the State of Utah and the United States, in holding that the suit as between said parties was in aid of a former decree, because it is apparent from the Counter-claim of the United States (R. 68) and the Reply of the State (R. 87-89) that as between such parties the controversy is one of an original character to cancel the certifications made by the United States to the State of Utah pursuant to the Enabling Act. The ownership of these certifications and of the title conveyed by them was vested in the State of Utah at the time of the Milner suit, and for many years after the date of the decree in that suit, and could not have been adjudged or determined in such suit, because the State of Utah was not a party thereto. To reach that subject required an original suit, as contradistinguished from one of an ancillary character. The counter-claim of the United States and the reply of the State constitute an original suit.

7. It is apparent from the opinion of the Court in the case at bar, and especially from the opinion in the case of United States v. Amalgamated Sugar Company, decided by the Circuit Court of Appeals of the Tenth Circuit on March 5, 1931, that said Circuit Court of Appeals, in holding that the Statute of Limitations did not apply because the suit was one to impress the land involved with a constructive trust, erroneously relied upon two decisions of this Court; Lockhart v. Leeds, 195 U. S. 427; United States v. New Orleans Pacific Ry., 248 U. S. 507, when neither of such cases can by any possibility affect the question being presented. Where the Government brings a suit to protect the rights of third parties, of course the statute does not apply.

8. It is believed that the decree of the Circuit Court of Appeals ignores the general rule of law conceded everywhere, that in the absence of statute to the contrary, a purchase money mortgage has priority over a previously docketed judgment against the mortgagor, and when the Circuit Court of Appeals subordinated the State's mortgage to the judgment and decree rendered against the Carbon County Land Company, in 1914, it failed to appreciate that the legal and practical effect of the transaction between the State and the Carbon County Land Company was to convey to the latter company an equity of redemption only, and leave the title to the land in the State. 41 C. J., Pages 458 and 528, Sections 352 and 470 of Mortgages.

9. It appears that the certifications were not tainted with any fraud at the time they were made, and that, according to the then existing standards, their validity was beyond attack. It is believed that the Circuit Court of Appeals, by its decree, has, in violation of fundamental principles generally accepted, transformed an act, honest when done, into a fraudulent one, by a retroactive application of a technical rule first declared by this court long after the date of said certifications.

These questions have been decided, it is believed, in conflict with the general law in a way that is untenable and in violation of the prior decisions of this Court. The decree, of which a review is sought, constitutes an extraordinary departure from the usual course of judicial proceedings.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court, on a day designated for its review and determination, a full and complete transcript of the record and all proceedings in the United States Circuit Court of Appeals had in said cause entitled "United States of America, Appellant, vs. Carbon County Land Company, a corporation, and Independent Coal & Coke Company, a corporation, Respondents, and State of Utah, Intervener, No. 248", to the end that said cause may be reviewed and determined by this Court, as provided by law, and that said judgment of the United States Circuit Court of Appeals for the Tenth Circuit herein may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

STATE OF UTAH,

By GEORGE P. PARKER,
Attorney General of the
State of Utah.

The Independent Coal & Coke Company joins in the foregoing petition of the State and requests that the same be granted as prayed for.

INDEPENDENT COAL & COKE CO.,

By MAHLON E. WILSON,
Attorney for Independent Coal & Coke Company.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The record contains a large amount of immaterial and unnecessary matter, with the usual resultant inconvenience and useless expenditure for printing, amounting to $769.36 (R. 601), but its settlement in its present form was made at the instance of the United States, by the Trial Court, over the objection of your petitioner and the defendants. (R. 564-569)

OPINION OF COURT. The opinion of the Circuit Court of Appeals of the Tenth Circuit was rendered January 14, 1931. (Not yet reported. It appears in the record at Pages 592-597.)

Another opinion by the same Court, involving the same question relative to the application of the Statute of Limitations, in another pending cause, to-wit: that of United States v. Amalgamated Sugar Company, decided March 5, 1931 (not yet reported) is annexed, in an appendix. (Page 37)

JURISDICTION OF COURT. This application for writ of certiorari is made under Section 240 of the Judicial Code (U. S. C. Title 28, Sec. 347)

In the foregoing petition an attempt has been made to state all facts that are relevant to the questions involved, and the reasons for the allowance of the writ applied for, and also to specify the errors in detail which are claimed by your petitioner. For the purpose of this brief these errors may be summarized as follows:

SPECIFICATION OF ERRORS.

1. That the Circuit Court of Appeals erred in finding and holding that the State of Utah is concluded and estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party. (Decree affirmed by Circuit Court of Appeals of Eighth Circuit in 1915, 228 Fed. 431. Appeal dismissed by this Court for want of jurisdiction, 248 U. S. 594.)

2. That said Court erred in finding and holding that Section 8 of the Act of March 3, 1891, providing that suits

by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, did not bar the United States as against the State of Utah.

3. That said Court erred in finding and holding that the land involved was known mineral land at the time of its selection by the State of Utah, and that the certifications made by the United States to said State were fraudulently obtained.

4. That said Court erred in finding and holding that the State of Utah was a privy to the Carbon County Land Company, and in cancelling and annulling the State's purchase money mortgage securing the payment of an indebtedness of $556,428.

Unless the State can maintain its contention contained in Specification No. 1, it concedes defeat. If Specifications Nos. 1 and 2 are both maintained by the State, then a consideration of Specifications Nos. 3 and 4 is unnecessary, because the defeat of the United States is inevitable.

SUMMARY OF ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party.

The decision below, holding that the State was concluded and estopped by such decree, destroys the sovereignty of the State and violates Article III of the Federal Constitution, and is contrary to and in conflict with all prior decisions of this and every other Court, both Federal and State.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State, and has the effect of conferring ownership on the State.

The decision of the Court below is contrary to and in conflict with the prior decisions of this Court, and is predicated upon two Supreme Court decisions, Lockhart v. Leeds, 195 U. S. 427; United States v. New Orleans Pac. Ry. Co., 248 U. S. 507, neither of which is applicable to the case at bar.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States were not fraudulent, because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character. It became mineral in character only by reason of a change in the law made ten years after said certifications. The standard existing at the time the certifications were made should have been applied.

The decision of the Court below, holding that the certifications were fraudulent "in a legal sense" (quoting the Court's opinion, R. 596), rests not only upon an erroneous application of the doctrine of res judicata to the State, but also upon a retroactive application of a standard adopted ten years after the certifications were made, and is in conflict with the general law of the land, which in substance requires that the legality of an act shall be determined by the standards existing at the time of its commission.

POINT IV.

PURCHASE MONEY MORTGAGE.

Either the State should have been decreed to be the owner of the land or its rights as the owner and holder of the purchase money mortgage should have been preserved.

The decision of the Court below, finding and decreeing an annulment of this mortgage, is an extraordinary departure from the accepted equitable principles and the usual course of judicial proceedings.

ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against the Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party.

If the decree entered in the suit of 1914 is conclusive and binding upon the State, then all prior discussion had since the commencement of this suit in 1924 about impressing the land involved with a constructive trust, has been mere intellectual exercise, and the suit of May, 1924, together with all the proceedings had either in the Trial or Appellate Courts, has been vain and useless, because a constructive trust cannot be established or created against a defendant who has not at least some semblance of title.

The first decree of the Trial Court in this suit dismissed the bill of the United States on the ground that the relief prayed for was barred by the Statute of Limitations. If the State is estopped by the decree of 1914, then the Trial Court's decision was erroneous only because it gave a wrong reason, and either the Circuit Court of Appeals or this Court should have affirmed the decision of that Court holding that the suit should have been dismissed, because neither of the defendants to that suit had any title whatsoever, and the United States should have been left to its remedy in ejectment and for damages, or to that remedy which was incident to the injunction contained in the decree of 1914. But neither the Circuit Court of Appeals of the Eighth Circuit nor this Court held that the decree of 1914 was binding upon the State. On the contrary an examination of the opinions rendered will reveal a determination that the State still retained title to the lands involved, and that the decree of 1914 did not affect the interests of the State.

The former decision of this suit assumed "that the legal title of the State was not affected by the decree in the first suit, although the United States, in an appropriate proceeding, might have procured the annulment of the certification at least within the period of limitations", but that decision also held that a bona fide purchaser, buying directly from the

State, would receive an indefeasible title. Such a holding precludes the thought, it is submitted, that the decree of 1914 estops or concludes the State, and therefore the decision of the Court below is in conflict with the former opinion of this Court. (274 U. S. 640)

It is also in conflict with many other decisions. Even as between private parties, where the relation of vendor and purchaser exists, a judgment against the purchaser is not conclusive on his vendor.

Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339;
Cadwallader v. Harris, 76 Ill. 370;
Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229.

In order to make the judgment available, even to the grantee of the title, his covenantor must receive notice of the suit and have an opportunity to defend it. (Substance of opinion in Kapiolani case.)

Conceding some conflict in the authorities upon this question when it arises between private parties, there seems to be no conflict in cases involving either one of the States or the United States. The State of Utah could be sued by the United States for the cancellation of the certificates to the lands involved, only in the Supreme Court of the United States. Either the consent of the State to be sued in the Supreme Court of the United States by the United States or by another State has been given by the adoption of the Federal Constitution or that charter renders consent on the part of the State unnecessary. But a State cannot be compelled to appear in any other court, State or Federal, without its consent, and no person can represent it except by authority expressly given by law. The Attorney General in this case appears under and pursuant to authority vested in him and direction given to him by the Governor of the State of Utah, pursuant to the provisions of Section 5682 of the Compiled Laws of Utah, 1917.

If by using its officers in possession of its property, or its vendees of such property, and obtaining judgment against such persons, the State could be bound, then such State could be compelled to go into any court having jurisdiction of the private parties and litigate with such parties in defense of

its property, and the doctrine of immunity from suit without its consent would serve no useful function.

Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137.

Quotation from opinion of Mr. Justice Harlan:

> "The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the state to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim."

Hussey v. United States, 222 U. S. 88; 56 L. Ed. 106;
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209;
State v. Cincinnati Tin Co., 66 Ohio St. 182; 64 N. E. 668.

The authorities are believed to be without conflict upon this question.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State, and has the effect of conferring ownership on the State.

This suit was brought May 16, 1924, against the Carbon County Land Company and the Independent Coal & Coke Company. By the bill the United States sought to impress a trust on the lands involved against those companies. Judgment was rendered in the Trial Court in favor of the companies on the ground that the action was barred by the Stat-

ute of Limitations under discussion. This judgment was reversed by the Circuit Court of Appeals of the Eighth Circuit (9 Fed. 2d, 518), and the decision of the Circuit Court of Appeals was affirmed in this court, three justices dissenting. (274 U. S. 640)

When the case was remanded to the Trial Court, your petitioner, over the objection of the United States, obtained leave to intervene, and set up what it believed to be its interest in the land involved, to-wit: a mortgage securing an indebtedness of $556,428, the entire purchase price of said lands. In its bill for intervention it prayed that its title to said lands be quieted as against all claims of the United States, and for all general, proper and equitable relief. (R. 33-41)

After unsuccessfully moving to strike the bill, the United States filed its answer and a counterclaim. (R. 65-68 et seq.) In this counterclaim the United States, among other things, prayed that the title of the United States in and to said lands be quieted as against all claims and demands of the State of Utah, and in the alternative, among other things, that the certifications of the lands made to the State of Utah be delivered up and cancelled, and that the Court, by its decree, cancel and annul the same.

This counterclaim against the State constitutes an original and independent suit by the United States against the State. It is not one in aid of a former decree.

To that counterclaim the State of Utah filed its replication, pleading, among other things, that the suit was barred by the provisions of Section 8 of the Act of March 3, 1891. (R. 87)

In and so far as the suit between the United States and the State of Utah is concerned, its subject is the title that was conveyed by the United States to the State by the certifications. That subject was unaffected by the suit brought in 1907, resulting in the decree of 1914, unless, of course, the decree of 1914 binds the State when it was not a party to the suit.

If the Carbon County Land Company, or any other party, was precluded by the decree of 1914 from taking the title to the land involved under the State Patent of 1920, in a new and independent transaction, then that State Patent is ab-

solutely void, as was held by the Trial Court. (R. 90) If, however, that State Patent has any effect, then the State's mortgage should function. The State should certainly not lose the benefit of its mortgage security because the Carbon County Land Company violated the injunction of 1914.

These statements are urged upon the Court for the purpose of establishing the fact that the suit brought by the United States in its counterclaim against the State was original and not in aid of any former decree.

But, independent of these considerations, the mere fact that a suit is brought in aid of a former decree does not prevent the application of a Statute of Limitations in favor of a party brought into such suit. It is well established law that a creditor or a claimant can reach generally, with the aid of equity, any property which the debtor might reach with the said aid, but the ancillary action against the new party to reach such property must be brought within the period prescribed by applicable statutes of limitation.

Davey v. Dodge, 213 Fed. 722, Eighth Circuit.

But it is said that this Statute of Limitations does not apply because the plea of limitation of six years is no obstacle to a suit to impress a trust on the title to land certified, and that "the primary relief sought against the state is the same as that against the companies,—to impress a trust on such title as it has in aid of the 1914 decree. That statute does not therefore bar this action." (See Opinion, R. 593.)

In the case of United States of America v. Amalgamated Sugar Company, argued the same day as case at bar, decided by the Circuit Court of Appeals of the Tenth Circuit March 5, 1931 (see opinion, Pages 33-36), Circuit Judge Lewis used the following language:

> "This view" (referring to the claim that the Sugar Company was a trustee ex maleficio) "if sustained renders the plea of limitation of six years in which to sue bad, for the uncancelled certification is no obstacle to the trusteeship which equity imposed when title was taken with notice of the fraud. The opinion in Lockhart v. Leeds, 195 U. S. 427, sustains appellant's contention on the point stated."

In a special concurring opinion in the same case, Circuit Judge McDermott says:

> "I concur in the opinion of the Court with serious misgivings."

And again, after quoting Section 8 of the Act of March 3, 1891, he says:

> "The avowed purpose of this statute, as disclosed by its legislative history, was to give stability to land titles and to encourage settlement of public lands. The statute applies although the patent was procured by fraud. United States v. Winona, etc., R. Co., 165 U. S. 463, 476. If this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action."

And, after quoting from the opinion in the Chandler-Dunbar case, 209 U. S. 447, he says:

> "This reasoning seems to me to be sound. I have difficulty in reconciling myself to the proposition that if, by reason of the statute, the government may not bring suit to annul its patent, it may nevertheless recover the land by impressing a trust on the title. True, the latter action saves the rights of bona fide purchasers; but those generally are saved by other sections of the statute. The situation is aggravated when, as in the case at bar, the form of the action is one to vacate the certification."

In the concluding part of his opinion he says:

> "But the case of United States v. New Orleans Pac. Ry. Co., supra, is analogous on the facts, and the decision is clear-cut. While the result seems to be to enable the government to escape the statutory bar in all cases except where a bona fide purchaser is involved, and to disturb the repose sought by the statute, I feel that the two Supreme Court cases cited are determinative, and therefore concur."

There are several answers to the contention that the effect of the statute may be thus avoided. In the first place, the suit as against the State, presented by the counterclaim of the United States, was to vacate and annul the certifications—not to declare a trust, and while the Circuit Court of Appeals held that "the primary relief sought against the State" was to impress a trust, no such relief was, or, it is submitted, could have been, granted against the State. The State was not guilty of any fraud. The State did not obtain the title from the Carbon County Land Company, but it obtained its title by certification from the United States at a time when it was being held by the General Land Office at Washington that this land was non-mineral in character. No decree, it is submitted, could have been made against the State, declaring it a constructive trustee, and an examination of the mandate and the decree of the Circuit Court of Appeals shows nothing further as against the State than that "the decree should operate as a cancellation of the lien of the mortgage held by the State and of any tax deeds or liens thereon. The title of the United States should be quieted. The defendants and the intervener, or anyone claiming under them, should be enjoined from asserting any claim to the title or possession of the premises." (R. 596)

It is true that the defendant companies are ordered to convey to the United States, but it is provided "failing which the decree should operate as a conveyance." (R. 596)

The substance of this decree, it is submitted, is a vacation and annulment of the certifications. It is undoubtedly true, generally speaking, that the Court may grant proper relief, although such relief is at variance with the theory disclosed by the specific prayer of the bill; but it is also true, it is submitted, that the application of the statute under consideration is to be determined by matters of substance rather than form.

Where two concurrent remedies exist, and one is barred by the statute, equity is compelled to bar the other. This is true of legal and equitable actions; a fortiori of two equitable remedies; especially so where the one, a constructive trust, necessarily includes all the essentials of the other. No such trust can be declared without vacating and annuling both the form and the substance of the grant. If the latter is affirmed, it stands (213 Fed. 722) and is an immovable obstacle to the creation of a constructive trust. If a trust is declared the

grant is annihilated. The statute should not be sacrificed to any such a fiction as a constructive trust. Such a trust is a mere assumption—not a fact—indulged in not as an end but to work out another purpose—in this case to bring about a vacation of the grant.

This statute, like all other statutes of limitations as to land, gives a substantive right. In form it cuts off a remedy, but in substance it preserves and protects seisin, "because the person seised is owner till someone else proves a better right to seisin." (3 Holdsworth's History English Law, 93). This statute creates a rule of property—not one of procedure—and the decisions of this Court have so held.

United States v. Winona, 165 U. S. 463.

In that case it was claimed that the certifications were procured by fraud, but this Court applied a section of this identical legislation to the certification and held that the title of the purchaser had been confirmed, treating the words "patent" and "certification" as synonymous.

United States v. Chandler-Dunbar Co., 209 U. S. 447-450.

In this case the United States filed a bill to remove a cloud from its title to certain lands. The defendant relied upon this statute. The United States replied that the action was not one to vacate and annul a patent but to quiet title. This contention of the Government was not sustained, the Court using the following language:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

Robinson v. Hook, 4 Mason 132; 20 Fed. Cas. 1017, decided by the Circuit Court for the District of Maine in 1826, Circuit Justice Story rendering the opinion. He said:

> "But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted, that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed. The doctrine appears to me well established, that in cases, like the present, of merely constructive trusts, where there are concurrent remedies at law and in equity, the statute of limitations is a good bar, and may be pleaded to a suit in equity as well as at law."

He cites Elmendorf v. Taylor, 10 Wheat. 152, decided by Chief Justice Marshall in 1825. Quotation from syllabus:

> "Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held by analogy to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired."

In his opinion Chief Justice Marshall said:

> "This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, "strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who are not permitted to do anything adverse to it." They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title."

To avoid the Statute of Limitations, because of a trust, the latter must be of a technical and continuing character, which falls properly and peculiarly within the exclusive jurisdiction of a court of equity.

Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 411.

This decision was rendered by Chief Justice Kent in 1823. The courts throughout this country have always regarded it with great respect because it is an exhaustive discussion of the authorities and principles relating to the application of statutes of limitation to cases where a trust is involved. From it, one is compelled to deduce the principle that the statute barring a concurrent remedy cannot be avoided by merely seeking to establish a constructive trust.

New v. Smith, 86 Kan. 1; 119 Pac. 380.

The Court said:

> "Looking beyond mere form of the action to the real issue therein we hold that the action is an action for relief on the ground of fraud, and that the two-year limitation applies."

Landis v. Saxton, 105 Mo. 486; 24 Am. St. 403.

This case recognizes the principle that if the remedy of a constructive trust is merely concurrent with some other remedy, that is barred, then the statute applies with the same force to constructive trusts as it does to the concurrent remedy.

From these authorities, and the others cited in the petition, it is apparent that the decision of the Court below is in conflict with the prior decisions of this Court, which recognize the statute as creating a meritorious right, and also with the general law of the land as it has been established by the leading cases announced by the Courts.

But the Circuit Court of Appeals apparently relies upon Lockhart v. Leeds, 195 U. S. 427, and United States v. New Orleans Pac. Ry. Co., 248 U. S. 507.

Lockhart v. Leeds does not appear to throw any light upon the question of the application of the statute.

United States v. New Orleans Pac. Ry Co., supra, is not in point, because the United States was not suing to recover land which it owned or claimed to own, but it was suing to protect the rights of third parties, viz: homestead claimants; and where the United States bring a suit to protect the rights of third parties, or brings a suit to declare a forfeiture because of a breach of a condition subsequent, the statute, of course, could not apply. Such suits are illustrated by the following citations:

Cramer v. United States, 261 U. S. 219.

In this case suit was brought by the United States, acting in behalf of three Indians, and it was claimed that the suit was barred by the identical statute under consideration. Mr. Justice Sutherland said:

> "The object of that statute is to extinguish any right the Government may have in the land which is the subject of the patent—not to foreclose claims of third parties."

La Roque v. United States, 239 U. S. 62.

In this case it was urged that this statute barred the action, but this Court held that it had been determined that this section referred to patents issued for public lands of the United States, saying:

> "This trust patent was not issued for public lands of the United States but for reserved Indians lands, to which the public land laws had no application."

Without further citation of authority, it seems clear that cases wherein the United States is seeking to protect the rights of third parties, such as the New Orleans case, are not applicable to the question under consideration.

From the opinion in the Amalgamated case, which case was argued before the Circuit Court of Appeals immediately before the case at bar, the conclusion is inevitable that at least one member of the Circuit Court of Appeals had grave

doubts or "misgivings" as to the validity of the contention, and that he relied upon the New Orleans case. He conceded that the purpose of the statute had been defeated, and when such a concession is made, then there is no security as to land titles within any of the public land states. The situation is a deplorable one, and it is submitted that it is important that this Court should give a decisive answer to these questions. Its public importance cannot be stated too strongly.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States were not fraudulent, because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character. It became mineral in character only by reason of a change in the law made ten years after said certifications. The standard existing at the time the certifications were made should have been applied.

It appears from the opinion of the Court below that there was no exposure of any commercially valuable coal on any subdivision of the land selected; that at the time of the selection there was a rule of the General Land Office at Washington to the effect that without such exposure the lands could not be listed as mineral.

It also appears from the opinion of the Court below that Milner and his associates, in making their application to obtain this land for grazing purposes, had no moral turpitude, i. e. they were acting honestly in obtaining the lands by the only method that was at that time open to them under the law. It is true that as to Milner and the Carbon County Land Company "it has been adjudicated that, in a legal sense, they fraudulently obtained these lands from the United States" (opinion Court below, R. 596), but if that adjudication does not estop or bind the State of Utah, then the question is open for consideration here.

It was not until the decision of this Court, rendered in April, 1914, United States v. Diamond Coal & Coke Co., 233 U. S. 236, that the rule of the General Land Office was changed. A change of this rule made the lands involved mineral in character, and a retroactive application of the new

rule made that which was honest at the time of its commission fraudulent ten years later.

Clancey v. Barker, 131 Fed. 161 (8th Circuit, 1904.)

In this case Circuit Judge Sanborn used the following language. (Page 171):

> "A retroactive decision which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto statute."

United States v. Winona & St. Peter Railway Co., 165 U. S. 463, 41 L. Ed. 789.

Quotation from the opinion of Mr. Justice Brewer:

> "It belonged to the government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was erroneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act."

The result is that when the State obtained these lands from the United States the certifications were not tainted with any fraud, either committed by the State or its officers or any other person. The lands at that time were merely grazing lands, as they were represented to be, and it is submitted that it is a fundamental principle of American law that the quality of an act is to be determined by the standards in force at the time of its commission. The mere fact that the Milners and the

Carbon County Land Company stand adjudicated, as is held by the Circuit Court of Appeals, does not prevent a decision on the merits as to the State of Utah, and it is submitted that the making of a retroactive application of the rule announced ten years after the certification of the lands is contrary to a fundamental principle generally conceded by men.

POINT IV.

PURCHASE MONEY MORTGAGE.

Either the State should have been decreed to be the owner of the land or its rights as the owner and holder of the purchase money mortgage should have been preserved.

It seems that the Trial Court found that the patent issued by the State of Utah to the Carbon County Land Company was void, and, in accord with the prayer of the Reply of the State, the Trial Court decreed these lands to the State. It is true that the State claimed a purchase money mortgage upon the lands, but the purchase money mortgage was for the full purchase price of the lands, to-wit: $556,428.

The Court of Appeals in effect held that the State claimed under the Carbon County Land Company and therefore cut off the lien of the mortgage. It is submitted that this was in conflict with the well known equitable principle that an owner of land does not lose his seisin or his right thereto by conveying the land, and in the same transaction taking a purchase money mortgage thereon to secure to him the payment of the purchase money to be paid. A purchase money mortgage has always been a favorite of a court of equity, and it would seem that the opinion of the Circuit Court of Appeals violated the general law of the land when it reversed the decision of the Trial Court, denied ownership in the State and cancelled the rights of the State in the land as security for the payment of amount due. 41 Corpus Juris, Sections 352 and 470, Pages 458 and 528 of Mortgages.

CONCLUSION.

It is said in the opinion of the Court of Appeals "That the State has no just claim to these lands is clear. It is in no sense a purchaser for value." (R. 593)

And again:

> "As a matter of fact, the state's position in this case is not entirely worthy of it. Asserting its own

innocence, it seeks now to appropriate the benefits of the misrepresentations of others and to secure valuable land which was not granted to it." (See opinion, R. 593)

The rules relative to valuable consideration and payment thereof do not and cannot apply as between the United States and the State with reference to the land involved. It is perhaps correct to say that the United States became the owner of such land by its treaty with Mexico and the State by the grant contained in the Enabling Act, followed by the certifications, but neither sovereignty paid any consideration for the land. The State could have selected its entire acreage of the floating grants immediately after Statehood if it had seen fit so to do. Until certification the United States held the land —not for purposes of mining or farming or grazing, but to be acquired by its citizens for appropriate purposes, and it has been the uniform and constant policy of the United States to encourage the settlement of public lands. The State, if permitted by this Court, will, under the grant, hold this land, or its equivalent in money, for educational purposes, in trust, so to speak, for the intellectual development of the younger generation. When the State took the land in the years 1901-1904, as is said in the opinion of the Circuit Court of Appeals, there was no moral turpitude either on its part or even on the part of Milner and his associates. Many lawyers and some Courts, according to the opinion, and the General Land Office at Washington, were holding that this land was agricultural and not mineral in character, because there were no outcroppings on the surface of any subdivision of said land. This rule was not changed until 1911 by the Circuit Court of Appeals of the Eighth Circuit, and not until April, 1914, by this Court.

When the suit against Milner was brought in 1907, by Mr. Maynard, the Special Assistant Attorney General of the United States, he convened the State Land Board in regular session and assured that Board that the United States did not seek to deprive the State of its title. Was it wrong for the State to believe him?

When the decree of 1914 was affirmed by the Circuit Court of Appeals in 1915, nothing was done which would indicate any purpose on the part of the United States to revoke the assurance of its representative made in 1907. In February, 1920, its then Governor and Attorney General and other

officers believed the State's title absolute. Reputable attorneys representing the Carbon County Land Company thought likewise, and the land was conveyed to the Carbon County Land Company by the State Patent dated February 10, 1920. That patent was immediately placed of record. Everybody involved seemed to be acting honestly and openly, however mistaken they may have been as to the law or as to their legal rights.

When the Independent Coal & Coke Company came into the transaction in October, 1920, its regular counsel gave an opinion that the title was good and marketable, and additional and independent counsel, emminent on the State Bench for many years and still eminent at the Bar of Utah, the Honorable C. W. Morse, gave a like opinion. He said, among other things:

> "If I am correct in the assumption that the selection by the State Land Board, and the certification under such selection by the Secretary of Interior, passes the title and is the equivalent of the issuance of a patent, then I think we may safely say that the statute of limitations above referred to would inure to the benefit of the State of Utah, or anyone holding title under it to these lands." (R. 365)

All of the correspondence which passed between the Independent Coal & Coke Company and its attorneys was voluntarily produced on the trial of this cause, and there has never been any disposition on the part of the State of Utah, or the other parties to this suit, to conceal any of the facts of this transaction.

After these opinions were rendered, the Independent Coal & Coke Company delivered to the Carbon County Land Company approximately 365,000 shares of its capital stock, having an actual value of at least sixty cents a share, and entered into a contract with the State, whereby the State agreed to segregate the land bought by the Independent Coal & Coke Company from the operation of the mortgage of the Carbon County Land Company and to release that 1120 acres to the Independent Coal & Coke Company upon the payment by the Company to the State of $100 per acre for that land, or $112,000, which sum the Independent Coal & Coke Company assumed and agreed to pay to the State. It is clear

that the relation between the State and the Independent Coal & Coke Company became direct, and that from the time of this transaction the Coal Company was the vendee of the State. (R. 391) The Coal Company paid $40,000 in taxes. (R. 99)

When this suit, commenced May 16, 1924, was dismissed by the Trial Court and that decision reversed by the Circuit Court of Appeals of the Eighth Circuit, the State was impelled to and did apply to this Court to be heard, and when this Court remanded the cause for further proceedings, the State then waived its immunity and voluntarily intervened, over the objections of the United States. The officers of the State believed that its presence in the suit would permit the matters in issue to be fully and completely determined, and that such an important controversy should not be tried without the presence of all parties interested, regardless of immunity.

The Trial Court held that the State had the title because of the Statute of Limitations. It is not believed that it was wrong for the State to defend the ruling. A more appropriate method than that of appealing to the courts ordained for the purpose, by which the officers of the State could ascertain their duty as to the land involved, cannot be conceived. The importance of the questions involved, not only as they relate to the particular land, but also as they affect the title to land generally, must be conceded by everyone.

After all these proceedings the State now petitions this Honorable Court for a final review, submitting its claims and rights, if any, with unfaltering and respectful deference to that Court which has been ordained by the Constitution to have exclusive original jurisdiction of all suits where a State is a party.

It is submitted that the petition for the writ should be granted as prayed for.

Respectfully submitted,

GEORGE P. PARKER,
Attorney General of the State of Utah.

MAHLON E. WILSON,
Attorney for Independent Coal & Coke Company.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS
TENTH CIRCUIT

No. 39—January Term, 1931.

United States of America, Appellant, vs. Amalgamated Sugar Company, a corporation, et al., Appellees.	Appeal from the District Court of the United States for the District of Utah.

[March 5, 1931.]

Mr. Charles R. Hollingsworth, United States Attorney (Mr. Seth W. Richardson, Assistant Attorney General, and Mr. Nat M. Lacy, Special Assistant to the Attorney General, were with him on the brief) for appellant.

Mr. Emmett M. Bagley (Mr. Robert L. Judd, Mr. Paul H. Ray and Mr. T. H. Devine were with him on the brief) for the appellee, The Amalgamated Sugar Company.

Before Lewis, Cotteral and McDermott, Circuit Judges.
Lewis, Circuit Judge, delivered the opinion of the Court.

This is an appeal from an order of June 30, 1928 dismissing appellant's amended bill of complaint, brought to recover eighty acres of land in Utah which had been certified to that state by the Secretary of the Interior and the Commissioner of the Land Office under Sections 12 and 13 of Act of July 16, 1894 (28 Stats. 110). The amended bill alleged that Godfrey Fuhriman, now deceased, and Ferdinand Zollinger, Jr., with others whose names are unknown to plaintiff, formed a plan to obtain title to certain lands of plaintiff, including the eighty acres here involved, by inducing said state to select the

said eighty acres and other lands under said statute by falsely representing that they were non-mineral in character, when they well knew said eighty acres contained valuable mineral deposits, to-wit, limestone; that Godfrey Fuhriman on or about April 3, 1903, made and filed with the state of Utah an application to purchase certain lands including the eighty acres, and in support thereof he, at the same time, made a false affidavit therein stating there were not within the limits of said land mineral deposits; that the state in reliance upon the representations made by the said Fuhriman and pursuant to said application did on or about April 10, 1903, file with the Commissioner of the General Land Office its selection list, including among the lands selected by it under said statute for the establishment and maintenance of an institution for the blind as provided in said act, the said eighty acres; and thereafter, on or about October 10, 1903, the Secretary of the Interior approved the selection of said eighty acres, and said eighty acres was on December 3, 1903, certified by the Commissioner to the state of Utah; that in approving and certifying said eighty acres the Secretary and Commissioner relied upon the false statements as to the non-mineral character of said land, and the statements and representations of the state of Utah as to its non-mineral character made by it at the persuasion of the said Fuhriman, believed said statements to be true and were in ignorance of their falsity and were deceived thereby when said approval and certification was made. That Fuhriman then induced the state to issue to him a certificate of purchase of the eighty acres; that in May, 1904, the state issued its patent conveying said land to one Badger who held the title for Fuhriman; that Badger conveyed to Fuhriman and Fuhriman conveyed to a corporation owned and controlled by him and Zollinger, and the corporation on November 13, 1914, conveyed the eighty acres to the Amalgamated Sugar Company, a Utah corporation, and "that at the time of said conveyance to said defendant, Amalgamated Sugar Company, as aforesaid, and at all times, the said defendant, Amalgamated Sugar Company, well knew the fraudulent manner in which the said land was acquired from the plaintiff as hereinabove alleged"; that the value of the eighty acres is $50,766.00; that during every year since 1905 the defendants had received or taken from the eighty acres limestone to plaintiff's damage of $79,655.00.

The bill prayed that the court decree the certification to the state, so far as it affects the eighty acres, to be null and void, that the eighty acres be decreed free and clear of all

claims of defendants and the title thereto revested in plaintiff as of original right and quieted against the claims and pretensions of defendants, that the Sugar Company be divested of its title and enjoined from setting up or claiming any right, interest or title thereto, and from creating any cloud upon plaintiff's title. It is further prayed that the plaintiff recover damages for the value of the limestone taken, but that in the event the court should not decree the title to be revested in plaintiff as of original right and quieted against the claims of defendants, and each of them, that the plaintiff in that event recover damages in addition to the value of the limestone, the value of said eighty acres, to-wit, $50,766.00. The suit was instituted twenty-two years after approval and certification of the eighty acres to the state. The Sugar Company, Zollinger and Fuhriman's administrator were made defendants.

Each defendant moved to dismiss the amended bill on several grounds, some going to the merits, and one that the suit was barred by the statute of limitations. Act March 3, 1891 (26 Stat. 1099) (U. S. Code, Title 43, Section 1166). That Act provides that suits by the United States to vacate and annul any patents shall only be brought within six years after the date of issuance of such patent. The court sustained the several motions on the ground that the statute in bar was applicable, and it ordered the suit transferred to the law side of the court and gave appellant twenty days within which to conform its pleadings to an action at law. Equity Rule 22. The plaintiff excepted to this action of the court but complied with the court's order and filed its complaint on the law side which in substance is a copy of the amended bill, except it only sought recovery of damages for the claimed value of the land, to-wit, $50,766.00. The Sugar Company filed a demurrer to the complaint on the law side which the court sustained on November 18, 1927.

In June of the next year appellant petitioned the court for leave to withdraw its complaint on the law side and to permit it to stand on its amended bill on the equity side. An order was entered granting the request and also dismissing the amended bill to which said motion to dismiss had been sustained on June 30, 1927, but no order of dismissal was then entered. Appellees have moved to dismiss the appeal on the ground that it was not taken in time. It was taken within three months after the order of dismissal on June 30, 1928. No order of dismissal of the amended bill was made until that

time. When the court on June 30, 1927, sustained the motion to dismiss on the ground that the suit was barred, it could not dismiss the amended bill and at the same time transfer the suit to the law side. It did the latter. Transference from law to equity (U. S. Code, Section 397) is neither a final order nor decision nor an interlocutory order from which an appeal can be taken. Weaver v. Atlas Oil Co., 39 Fed. (2d) 847. In that respect we see no difference when the transfer is made under equity rule.

As already said, the complaint on the law side is a copy of the amended bill on the equity side. In the amended bill the appellant prayed for equitable relief, special and general. The complaint on the law side asked for relief at law, damages. Appellees insist that when appellant filed its complaint on the law side and prosecuted that remedy until the court on general demurrer held the complaint bad, it was an election of remedies; that it could not then go back to equity; and that by its procedure in seeking relief at law it elected and was bound to pursue that remedy. But appellant did not of its own choice seek relief at law. Its choice was in equity, and under protest it followed its case from equity to law on the court's order; and when the court ruled against it there, it asked and was granted permission to return to its choice, the equity side. Henderson Tire & Rubber Co. v. Gregory, 16 Fed. (2d) 589. One other point requires consideration. Appellees say the court was right in applying the statutory bar. Counsel for appellant reply that it may be conceded, arguendo, that the limitation statute applies to titles by certification (which they deny), as well as to titles by patent, still the court erred, because the frame of the amended bill entitled appellant to a decree that the Sugar Company took and has held the legal title as trustee ex maleficio for appellant, and the three defendants are liable for the limestone taken. This view, if sustained, renders the plea of limitation of six years in which to sue bad, for the uncancelled certification is no obstacle to the trusteeship which equity imposed when title was taken with notice of the fraud. The opinion in Lockhart v. Leeds, 195 U. S. 427, sustains appellant's contention on the point stated. See also Walden v. Bodley, 14 Peters 156, 164. The order dismissing the amended bill is reversed. The trial court will vacate that order and require answers.

McDERMOTT, Circuit Judge, concurring:

I concur in the opinion of the Court with serious misgivings. The United States parted with the legal title of the land involved on December 3, 1903. This action was commenced in 1926. The specific prayer is that the certification of 1903 be declared null and void, and that the United States be decreed to be the owner, and that it recover the possession of, the land. There is a prayer for general relief, but no specific prayer that the title be impressed with a trust.

Section 8 of the Act of March 3, 1891 (26 Stat. 1099, 43 U. S. C. 1166) provides that "suits by the United States to vacate and annul any patent * * * hereafter issued shall only be brought within six years after the date of the issuance of such patents." The avowed purpose of this statute, as disclosed by its legislative history, was to give stability to land titles and to encourage settlement of public lands. The statute applies although the patent was procured by fraud. United States v. Winona, etc., R. Co., 165 U. S. 463, 476. If this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action. And the Supreme Court has so held. In United States v. Chandler-Dunbar Co., 209 U. S. 447, 450, the United States filed a bill to remove a cloud from its title to certain lands. The defendant relied upon this statute. The government replied that the action was not one to vacate and annul a patent, but to quiet title. The defendant prevailed, the court holding that—

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

This reasoning seems to me to be sound. I have difficulty in reconciling myself to the proposition that if, by reason of

the statute, the government may not bring suit to annul its patent, it may nevertheless recover the land by impressing a trust on the title. True, the latter action saves the rights of bona fide purchasers; but those generally are saved by other sections of the statute. The situation is aggravated when, as in the case at bar, the form of the action is one to vacate the certification.

If it be assumed that the statute applies to certifications as well as patents (a question that has not been ruled by this Court), the conclusion that a suit to recover the lands may be maintained, notwithstanding the statute, is justified by two decisions of the Supreme Court. In Lockhart v. Leeds, 195 U. S. 427, 436, cited by Judge Lewis, it was held that a trust might be impressed upon land, notwithstanding there was no specific prayer therefor, and although such relief is at variance with the theory disclosed by the specific prayer of the bill. It is proper, therefore, to treat this bill as one seeking to impress a trust upon real estate. While the Amalgamated Sugar Company is entitled, as a constructive trustee, to the benefit of any statute of limitations, the Supreme Court has held, in United States v. New Orleans Pac. Ry. Co., 248 U. S. 507, that a statute similar to the one in question does not bar an action to impress a trust. That was an action by the United States to recover certain lands for the benefit of certain homestead claimants. The prayer was to cancel the patents or declare a trust. The Supreme Court disposed of the statute of limitations by holding:

> "As the patents were issued before, and the suits were brought more than five years after, the Act of March 2, 1896, c. 39, 29 Stat. 42, the prayer that the patents be cancelled must be put out of view and the alternative prayer—that the title under the patents be declared to be held in trust for the homestead claimants and the trust enforced—must be regarded as if standing alone."

It is suggested that Independent Coal & Coke Co., 274 U. S. 640, is to the same effect. But in that case the United States had been decreed to be the owner of the lands in an action brought within the statutory period, and the latter suit was in aid of the earlier decree. But the case of United States v. New Orleans Pac. Ry. Co., supra, is analogous on the facts, and the decision is clear-cut. While the result seems to be to

enable the government to escape the statutory bar in all cases except where a bona fide purchaser is involved, and to disturb the repose sought by the statute, I feel that the two Supreme Court cases cited are determinative, and therefore concur.

A true copy.
Attest:

(Seal) ALBERT TREGO,

Clerk U. S. Circuit Court of Appeals, Tenth Circuit.

FILE COPY

DEC 24
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 42. –

THE STATE OF UTAH,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE STATE OF UTAH, PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

THE STATE OF UTAH,
Petitioner,
v.
UNITED STATES OF AMERICA.
No. 42.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE STATE OF UTAH, PETITIONER.

Previous Opinion in the Present Case.

The opinion of the Circuit Court of Appeals for the Tenth Circuit is reported in 46 Fed. (2d) 980 (1931), and appears at R. 611-625. No opinion was rendered by the United States District Court for the District of Utah. The judgment and decree of the District Court appear at R. 97-98.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered January 14, 1931 (R. 626). Petition for writ of certiorari was filed April 6, 1931, and granted May 18, 1931 (R. 630), pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. (U. S. C. Title 28, Sec. 347.)

Statutes Involved.

The Act of July 16, 1894 (28 Stat. 109) (sometimes hereinafter referred to as the "Enabling Act"), provides as follows:

* * * * * * *

"Sec. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: PROVIDED, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

* * * * * * *

"Sec. 8. That lands to the extent of two townships in quantity, authorized by the third section of the Act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the

State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said Territory may be selected by said State. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this Act, and including all saline lands in said State, are hereby granted to said State, for the use of the said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said State; and the income thereof to be used exclusively for the purposes of such university and agricultural college respectively.

* * * * * *

"Sec. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only."

* * * * * *

"Sec. 12. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand by the State of Utah under the Act of September, twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant

of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to said State of Utah, the following grants of land are hereby made to said State for the purposes indicated, namely:

"For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and maintenance of a school of mines in connection with the university, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for establishment and maintenance of State normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the State of Utah.

"The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the State may provide.

"Sec. 13. That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of the said State of Utah.

* * * * * * *

Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 (U. S. C. Title 43, Sec. 1166), provides in part:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years of the passage of this act, and suits to vacate and annual (annul) patents hereafter issued shall only be brought within six years after the date of the issuance of such patents . . ."

The Act of March 2, 1896 (29 Statutes at Large 42, ch. 39) which amended the Act of March 3, 1891, provides, in part, as follows:

> "" . . That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon-road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought, maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the government or its officers to withdraw the same from sale or entry.

Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the Court to be a bona fide purchaser, a Court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such a suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States Court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the Second Session of the forty-ninth congress.

Sec. 3. That if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented

or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for such land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified."

Statement of the Facts.

This litigation concerns the title to 5,564.28 acres of coal land located in Carbon County, Utah.

The United States in the "Enabling Act" (*supra*, p. 2) made a grant of many thousands of acres of land to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. This grant was made in lieu of land for purposes of internal improvement made to new states." This was not a specific but a "floating" grant of unappropriated public lands. While this grant "neither expressly

includes mineral lands nor expressly excludes them" from those to be selected by the State, this Court has subsequently indicated that it did not include lands which at the time of selection were known to be mineral in character. See *United States* v. *Sweet*, 245 U. S. 563 (1917); *Independent Coal & Coke Company* v. *United States*, 274 U. S. 640, 642 (1926) and Section 2318 R. S. (30 U. S. C. A. 21).

Selections were to be made by the State of Utah with the approval of the Secretary of the Interior in such manner as the State legislature should provide. In 1896 the Legislature of the State created the State Board of Land Commissioners with authority to select particular lands under these grants, (Laws of Utah, 1896, Ch. 801), and to take such action as should prove necessary to obtain a final transfer of the title to the State.

Between 1900 and 1904 Stanley B. Milner and certain of his associates and relatives (hereinafter sometimes referred to as the Milners) applied to the State Board of Land Commissioners to purchase the lands involved in this litigation. Agreements were entered into with the State whereby the State undertook to select the lands in accordance with the terms of the Act of July 16, 1894, and "when so selected and patented to the State" to "sell to affiant the same at private sale, for one Dollar and 50 cents per acre". In these agreements the Milners agreed to purchase the land at the stipulated price and to release the State from its obligation to sell "if the said land shall hereafter be determined to be mineral in character" (R. 312-325).

These applications were accompanied by affidavits that the applicants were well acquainted with the lands and that they were non-mineral in character (R. 312-325).

> "* * * The state board relied upon the truthfulness of the affidavits and its president and secretary made

affidavit that the board had caused said lands to be examined, and that they were non-mineral. The state board then filed these documents with the local register and receiver of the United States Land Office at Salt Lake City, who certified that the lands were not listed on the survey as mineral lands, whereupon all papers were forwarded to the Commissioner of the General Land Office at Washington, and in reliance thereon the lands were certified to the state of Utah between 1901 and 1904. The agreement of the Milners to purchase then attached, under which the Milners had ten years to pay the purchase price, $1.50 an acre" *United States* v. *Carbon County Land Co.*, 46 F. (2d) 980, pp. 981-982.

Instruments described as "Certificates of Sale" were issued by the State to the Milners certifying that the lands had been sold to the Milners and undertaking, upon the prompt payment of the purchase price and full compliance with the laws of the State of Utah governing the Public Lands, to issue patents for the land. It is apparent from these provisions that the "Certificates of Sale" did not purport to convey legal title to the lands to the Milners. The certificates recited that an amount equal to twenty-five cents per acre had been received on account of the purchase price and provided for the payment of the remainder in ten equal annual instalments. It was agreed that "in case default be made in said payments * * * this certificate shall become null and void * * * and the title to said land revert to and revest in the State of Utah" (R., 325-339).

The Milners assigned all of their right, title and interest in and to the land to the Carbon County Land Company, a corporation in which Stanley B. Milner owned 97.95 per cent. of the stock. 46 F. (2d) 980, 982 (1931).

On January 7, 1907, the United States commenced an action against the Milners and their assignee (*United States* v. *Truth A. Milner, et al.*, 228 Fed. 431), alleging that the lands were mineral in character and did not pass under the grant from the United States to the State; setting up that the certifications from the United States to the State of Utah were procured by the fraudulent representation of the Milners and were therefore void and praying that the contracts between the Milners and the State of Utah be declared void and that the defendants be directed "to surrender up to the State of Utah for cancellation any and all" such contracts (R. 175-216).

The day after the complaint was filed F. E. Maynard, Special Assistant to the Attorney General of the United States, who commenced and carried on the Milner suit, appeared before the State Board of Land Commissioners and handed them a copy of the bill of complaint, pointed out that the State of Utah was not made a party to the action, and assured the Board that the United States was seeking merely to relieve the State of Utah from its contracts with the Milners and that the title to the lands was in the State of Utah and would remain in the State of Utah if the suit of the United States were successful (R. 263-266; see also Stipulation, R. 276). In apparent reliance upon this statement of Maynard the State of Utah did not intervene in the Milner case.

It is now apparent that these lands were in fact underlain by valuable coal deposits. There was, however, no exposure of commercially valuable coal on these lands at the time when they were certified to the State of Utah. At that time the United States Land Office in Utah and the State Land Board were subject to a rule promulgated by a Commissioner of the General Land Office to the effect "that

lands cannot be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres exposed for sale" (R. 387).* This ruling was in line

* Mr. J. C. Dick, a witness on behalf of the defendants, testified that he had been a surveyor for the Government in the year 1900 or thereabouts; that he was familiar with the duties of a surveyor acting for the Government making reports on Government tracts and that:

> "I think I remember the instructions I was given at that time. Those instructions emanated from the Surveyor-General's office of the United States. All surveyors have the same instructions in this intermountain country. We were instructed to report all lands as coal lands upon which coal outcropped only. I tried to carry out those instructions. That was the general practice among the persons surveying for the Government. It was returned to the Surveyor-General's office in connection with my field notes for record, and they were made and filed here in the General Land Office" (R. 569).

And again:

> "I reported as coal lands all lands upon which a coal outcrop appeared. Where there was a quarter section of 40 acres, a subdivision upon which no coal appeared, it was not reported as coal land. In other words, unless there was an outcrop on each forty-acre tract, I didn't report that particular tract as coal land" (R. 569).
>
> * * * * * *
>
> "If I didn't find any coal outcropping, I would report it as grazing land, or agricultural land, whatever it was."

This testimony shows that it was the general practice of the Government to regard that as coal land upon which there was an outcrop, and to regard that as agricutural or grazing land upon which there was no outcrop.

Mr. E. D. Dunn, a witness in the case of *United States* v. *Truth A. Milner, et al.*, testified that he had been a clerk in the United States Land Office, Salt Lake City, Utah, since December 16, 1902. He stated that:

> "I know, as a matter of fact, however, that under the rules and regulations, special or general, of the Commissioner of the General Land Office and Secretary of the Interior, that the local land office were not permitted to receive coal declaratory statements upon any of the public lands other than those upon which an exposure of coal had actually been made" (R. 521).

with many decisions of the Department of the Interior to the effect that there must be an actual discovery of mineral, in some quantity at least, before land could be held to be mineral in character and that it was not sufficient to prove that the lands lay in a mineral belt and that neighboring tracts contained minerals. *Scott* v. *Sheldon,* 15 L. D. 361 (1892); *John E. Williams,* 11 L. D. 462 (1890); *Commissioner of Kings County* v. *Alexander,* 5 L. D. 126 (1886); see also *Colorado Coal & Iron Co.* v. *United States,* 123 U. S. 307 (1887). The affidavits filed by the Milners (p. 8, *supra*) were therefore consistent with the policy which the Department of the Interior had established and were not fraudulent when judged by its rulings. In 1914, or approximately ten years after the lands were certified to the State of Utah, this rule of the General Land Office was in effect rejected by this Court in the Case of *United States* v. *Diamond Coal & Coke Company,* 233 U. S. 236 (1913). In that case it appeared that lands had been certified to the Diamond Coal & Coke Company in reliance upon affidavits stating that the land was non-mineral in character. The evidence clearly indicated, however, that the affidavits were knowingly and wilfully fraudulent. This Court held that the lands were fraudulently acquired and stated that:

> "There is no fixed rule that lands become valuable for coal only through its actual discovery within their boundaries. On the contrary, they may, and often do, become so through adjacent disclosures and other surrounding or external conditions; and when that question arises in cases such as this, any evidence logically relevant to the issue is admissible, due regard being had to the time to which it must relate" (p. 249).

The *Milner* case was tried in 1910. The evidence disclosed that there were no outcroppings of coal on the land:

> "* * * thus presenting the same legal question as the *Diamond Coal & Coke Company* case, then on appeal; the trial court therefore awaited the decision in that case. When that case settled the law, the trial court in June, 1914, decreed the United States to be the 'owner and entitled to the possession' of the lands involved, quieted its title against the defendants and all claiming under them, decreed that defendants had no title or right to possession to any part of the property, and perpetually enjoined them from asserting any claim thereto." 46 F. (2d) 980, 983.

This decree was affirmed by the Circuit Court of Appeals on November 15, 1915. 228 Fed. 431, Appeal Dismissed 248 U. S. 594 (1918).

In January, 1920, six years after the entry of the decree in the Milner suit, the State of Utah entered into a contract with the Carbon County Land Company whereby the State agreed to sell and the company to purchase the land involved in this suit for $556,428, payable as follows: $100,000 on or before January 1, 1931; $200,000 on or before January 2, 1940, and $256,428 on or before January 2, 1950. This indebtedness was evidenced by promissory notes and secured by a purchase money mortgage covering the land (R. 384-386; R. 586-589). All of the notes bear interest on and after January 2, 1925, at the rate of 5% per annum until maturity and thereafter at the rate of 8% per annum. On February 10, 1920, the State of Utah issued its patent to the Carbon County Land Company (R. 382-386).

In October, 1920, the Carbon County Land Company sold 1,120 acres of this land to the Independent Coal and

Coke Company, a Wyoming corporation. In payment for this land the Independent Coal and Coke Company assumed the indebtedness standing against this land in favor of the State of Utah amounting to $112,000 and gave the Carbon County Land Company approximately 360,000 shares of its capital stock, having a par value of $1.00 per share and a market value of not less than 60¢ per share. In addition the Independent Coal and Coke Company entered into an agreement with the State of Utah whereby the State undertook to convey the 1,120 acres to the Independent Coal and Coke Company upon payment to the state of the sum of $112,000 (R. 425, 436, 409). Thereafter the Independent Coal and Coke Company entered into possession of the land so purchased and since the date of its occupancy and prior to the institution of this suit in 1924, has paid to the State of Utah approximately $40,000 in taxes (R. 104).

On May 16, 1924, the United States filed a bill in the District Court against the Carbon County Land Company and the Independent Coal and Coke Company. The bill sought to have the Carbon County Land Company and the Independent Coal and Coke Company declared constructive trustees of the 5,564.28 acres of land involved in this suit and prayed that the defendants be ordered to convey to the United States whatever title they had derived from the State of Utah. The Trial Court dismissed the bill on the ground that the relief was barred by the Statute of Limitations. Upon appeal this ruling was reversed. *United States* v. *Carbon County Land Company,* 9 F. (2d) 517 (1925). On certiorari, this Court affirmed the decision of the Circuit Court of Appeals on the ground that the suit was in the nature of a supplemental bill in aid of the decree of 1914 and that it was therefore not barred by the Statute of Limitations which was specifically applicable to suits to

vacate and annul patents only. *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640 (1926).

On the return of the mandate of this Court to the United States District Court for the District of Utah, the original bill of complaint was amended (R. 1). The State of Utah then intervened and set up its mortgage, and prayed that its title be quieted as against the United States (R. 36).

The United States, after making unsuccessful objections to this intervention on the part of the State, filed its answer to the complaint in intervention, and also its counterclaim against the State of Utah (R. 70). In this counterclaim, the United States claimed the title to the land, and prayed, among other things, that the Court adjudge and decree that "the title of the United States of America in and to said lands be quieted against all claims and demands of the State of Utah" and in the alternative that the certifications of said land "*so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up to be cancelled, and that the Court, by its decree, cancel and annul the same*". (Italics supplied.) (R. 92.)

The State of Utah replied to this counterclaim, denying in substance that the lands were of a known mineral character on May 9, 1904, or at any time prior thereto, and alleging that the lands were classified as non-mineral, and that never, at any time until the commencement of the action on January 8, 1907, had the United States pretended or claimed that the lands were of a known mineral character. The State also alleged that the cause of action set forth in the counterclaim of the United States was barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which provides that suits by the United States "to vacate and annul any patent" shall only be brought

within six years after the date of the issuance of such patents. The State of Utah then prayed "that the United States take nothing by reason of said counterclaim; that said counterclaim be dismissed for want of equity; and • • • that the lands described in said counterclaim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States" and for general relief (R. 95-96).

Upon a hearing the Trial Court entered a decree that the State of Utah is, as against the United States, the owner of the lands in controversy (R. 97-98).

In reversing the decision of the Trial Court, the Circuit Court of Appeals held that (46 F. (2d) 980 (1931)):

I. Although the State of Utah was not a party to the suit entitled *United States* v. *Truth A. Milner, supra*, it was bound in equity by the decree entered in that case in 1914 which established the United States to be the "owner and entitled to the possession of the land involved" (R. 621).

II. The limitation of the Act of 1891 was not available to the State of Utah on the theory that this is an action to impress a trust on such title as the State has retained and is in aid of the decree of 1914 and not an action to annul a patent within the meaning of the Act of 1891 (R. 621).

III. The lands were known mineral lands at the time they were selected by the State and were procured from the United States by fraudulent misrepresentation (R. 622).

Specification of Errors to be Urged.

1. The Court below erred in holding that under the peculiar circumstances of this case the State of Utah is bound by the decree entered in 1914 in the case entitled *United States* v. *Milner, et al., supra*. (See Petition for Writ of Certiorari, page 9, errors Nos. 6, 7, 8, 10, 11 and 12.)

2. The Court below erred in holding that as against the State of Utah this action is not barred by the limitations prescribed by Section 8 of the Act of March 3, 1931. (See Petition for Writ of Certiorari, page 8, errors Nos. 2, 3, 4 and 5.)

3. The Court below erred in holding that, as to the State of Utah, the lands involved in this case were known mineral lands and that there was therefore a material misrepresentation of the facts as to the character of the lands. (See Petition for Writ of Certiorari, page 8, error No. 1.)

Summary of the Argument.

1. The Circuit Court of Appeals committed error in holding that the State of Utah was bound in equity by the decree entered in 1914 in the case entitled *United States* v. *Milner, et al., supra*. That action was brought in the District Court of the United States for the District of Utah. The State of Utah was not a party. It did not intervene. Under these circumstances the effect of the ruling of the Court below is to subject the State of Utah to the jurisdiction of the District Court without the consent of the State and in violation of the purpose and intent of Article 3 of the Con-

stitution. Nor can this ruling of the Court below be sustained on the theory that the State of Utah derived its title under the Carbon County Land Company. The State of Utah held a purchase money mortgage from the Carbon County Land Company but the holder of a purchase money mortgage executed as part of a transaction involving the transfer and sale of real property is not a privy in title of its mortgagor and is therefore not bound by a prior decree against such mortgagor.

2. Section 8 of the Act of March 3, 1891, which provides that suits by the United States "to vacate and annul any patent * * * shall only be brought within six years after the date of the issuance of such patent", bars the right of the United States as against the State of Utah and has the effect of conferring ownership of the lands on the State. The lands involved in this suit were conveyed to the State of Utah between 1901 and 1904 by certification of the Secretary of the Interior. Prior to the commencement of this suit no action was taken by the United States to annul or in any way adversely affect the legal title to these lands held by the State. The present action was commenced on May 16, 1924, or about twenty years after the date of the last certification of title to the State. It is therefore apparent that the present action was not commenced within six years after title to the lands was conveyed to the State of Utah by certification. It is also apparent that the word "patent" as used in the Act of March 9, 1891, includes both "patent" and "certification". This, in effect, was indicated by this Court in *United States* v. *Winona & St. Peters Railroad Company*, 165 U. S. 463 (1896). That case involved the Act of March 2, 1896, which amended and supplemented Section 8 of the Act of March 3, 1891, by

extending the limitation contained in that section. This Court clearly stated that the word "patent" as used in the Act of 1896 was intended "to confirm the title which in this case passed by certification to the State". This definition of the word "patent" is in accord with the practice of the Land Office which, both before and after the passage of the Act of March 3, 1891, has consistently employed the word "patent" to include both "patent" and "certification" and is entirely consistent with the use of the word "patent" in other legislation. The pleadings of the United States apparently proceed upon the theory that although by operation of the Statute of Limitations the government may not bring suit to annul its patent it may nevertheless recover the land by impressing a trust on its title. It is a fundamental conception of equity, however, that no one can impress a trust on real property who is not the owner of the equitable estate. Inasmuch as the running of the Statute of Limitations has the effect of obliterating completely the equitable title of the government, it cannot succeed in this action on the theory that the land is impressed with a constructive trust in its favor.

3. The Circuit Court of Appeals committed error in holding that the lands were obtained by the State of Utah as a result of a material misrepresentation of the known facts as to the character of the lands. The land was certified to the State of Utah in reliance upon affidavits which it submitted stating that the lands were non-mineral in character. There was in fact no exposure of commercially valuable coal on these lands at the time when they were certified to the State of Utah. At that time the United States Land Office in Utah and the State Land Board were subject to the rule promulgated by the General Land Office

to the effect that there must be an actual discovery of mineral in some quantity at least before land can be held to be mineral in character and that it is not sufficient to prove that the land lies in a mineral belt and that neighboring tracts contained minerals. The affidavits submitted on behalf of the State were correct when tested by this rule. This rule was not specifically rejected by this Court until ten years later in the case of *United States* v. *Diamond Coal & Coke Co.*, 233 U. S. 236 (1913). The decision of the Circuit Court of Appeals rests therefore upon the retroactive application of a standard of conduct adopted ten years after the certifications were made and is in conflict with the rule that the legality of an act shall be determined by standards existing at the time of its commission. Moreover, the record in the Milner case was not admissible in this case as evidence against the State of Utah for any purpose touching upon the merits of its claim and it is apparent that the Court below relied largely upon the record in the Milner case as proof of fraud. *Tindal* v. *Wesley*, 167 U. S. 204 (1896).

Argument.

The Court below stated that "the State's position in this case is not entirely worthy of it" (R. 622).

Briefly stated, the position of the State of Utah in this litigation is this:

When this suit was commenced the Statute of Limitations had long run against any proceeding by the Government to cancel or annul the certifications under which the State received its title to these lands. The State takes the position that the Statute of Limitations is a statute of repose, whose principles are founded on matters of public

policy, the ethics and morality of which have long ceased to be matters of controversy. It is submitted that in the discharge of its fiduciary duties the State of Utah has, and *a fortiori* its executives have, no right to waive the substantial rights of its citizens either in a spirit of generosity or because the invocation of the Statute of Limitations must necessarily have the effect of preventing a full trial of all of the issues which the Government has attempted to raise in this case.

I.

The State of Utah is not concluded or estopped by the decree entered in 1914 in favor of the United States against the Carbon County Land Company and the Milners in a suit in which the State of Utah was not a party.

The Circuit Court of Appeals for the Tenth Circuit held in this case that the State of Utah was bound in equity by the decree entered in 1914 in favor of the United States against the Milners.

The action against the Milners concerned 5,564.28 acres of coal land located in Carbon County, Utah. The Court in that case adjudged and decreed the "United States to be the true and lawful owner of the said lands" and restrained and enjoined the defendants "from setting up or making any claim to or upon said premises or any part thereof, and all claims of said defendants, and each of them, are hereby quieted" (R. 4). The same lands are involved in this suit.

The State of Utah was not made a party in the Milner suit. The United States might have brought suit in this

Court directly against the State of Utah. It chose instead to bring its action in the District Court of the United States and to confine it to private parties only. It is true that a copy of the complaint was left with the State Board of Land Commissioners. But at the same time that Board was advised by the Special Assistant to the Attorney General who commenced and carried on the Milner suit, that the United States was seeking merely to relieve the State of Utah from its contracts with the Milners and that if the suit of the United States were successful, title to the land would remain in the State of Utah.

It is submitted that under such circumstances the State of Utah is not bound in equity by the Decree of 1914 for the reasons that:

A. In the absence of "peculiar circumstances" the State will not be concluded or estopped by any judgment entered in any suit to which it is not a party.

The mere existence of this litigation is in effect an indication that the State of Utah was not bound by the Decree of 1914. The parties subject to that decree were perpetually divested of title to the lands. Consequently if they subsequently occupied the lands under claim of title they might have been treated as trespassers and ousted from possession either by ejectment or by contempt proceedings. But this is not such a proceeding. It is an action to impress the lands with a constructive trust. Such an action seems inconsistent with the claim that title was completely and perpetually divested by the Decree of 1914, because a constructive trust cannot be established or created against a defendant who, at least, has not some semblance of title.

Many decisions of this Court have clearly established that a judgment in an action to which a State is not a party

will not conclude or estop it. This doctrine is peculiarly applicable, where, as in this case, the effect of a contrary ruling would be to subject the State to the jurisdiction of the District Courts without the consent of the State. This would seem clearly to contravene Article 3 of the Constitution which, in effect, provides that without its consent a State may be sued by the United States in the Supreme Court of the United States only. *United States* v. *Texas*, 143 U. S. 621 (1892); *United States* v. *North Carolina*, 136 U. S. 211 (1889).

The reasons for this rule were discussed in *Tindal* v. *Wesley*, 167 U. S. 204 (1896). That was a suit between citizens of New York and citizens of South Carolina to recover the possession of certain real property located in South Carolina and to recover damages for withholding possession. The State was not made a party and did not intervene. One of the defendants answered that he was the Secretary of State of the State of South Carolina and that he held custody and possession of the property solely by virtue of his office and that the premises were the property of the State of South Carolina. The other defendant stated that he was engaged on behalf of the State "in watching, guarding and taking care of the said premises" (p. 206).

At the close of the testimony the defendants raised the question whether the suit was not in effect one against the State so that "the question is directly presented, whether an action brought against individuals to recover the possession of land of which they have actual possession and control, is to be deemed an action against the State, within the meaning of the Constitution, * * * And if the Court finds * * * that the plaintiff is entitled to possession, and that the assertion by the defendant of right of possession

and title in the State, is without legal foundation, may it not, as between the plaintiffs and the defendants, adjudge that the plaintiff recover possession," (p. 212).

This Court held that the answer to this question was "Yes". It was urged, however, that the effect of such a ruling would be to conclude the State of South Carolina in an action in which it was not a party. This contention was rejected by this Court as follows:

> "It is said that the judgment in this case may conclude the State. Not so. It is a judgment to the effect only that, as between the plaintiff and the defendants, the former is entitled to possession of the property in question, the latter having shown no valid authority to withhold possession from the plaintiff; that the assertion by the defendants of a right to remain in possession is without legal foundation. *The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim.* It was insisted in *United States* v. *Lee*, in support of the contention there made, that a judgment in favor of Lee against the persons who, as agents of the United States, held possession of Arlington would be in effect a judgment against the United States. But this court said: 'Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit

against an individual who has possession or control of such property can bind or conclude the Government, as is decided by this court in the case of *Carr v. United States,* 98 U. S. 433, already referred to, the Government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights. Hence, taking the present case as an illustration, the United States may proceed by a bill in chancery to quiet its title, in aid of which, if a proper case is made, a writ of injunction may be obtained. Or it may bring an action of ejectment, in which, on a direct issue between the United States as plaintiff and the present plaintiff as defendant, the title of the United States could be judicially determined. Or, if satisfied that its title has been shown to be invalid, and it still desires to use the property, or any part of it, for the purposes to which it is now devoted, it may purchase such property by fair negotiation, or condemn it by a judicial proceeding, in which a just compensation shall be ascertained and paid according to the Constitution.' 106 U. S. 222" (p. 223). (Italics supplied.)

Similarly in this case the Decree of 1914 does not conclude or estop the State of Utah. It is a judgment to the effect only that as between the United States and the Milners, the United States is the full owner of the land. Since the United States failed to bring action against the State of Utah, it has obtained no judgment binding upon the State. The right and title of the State of Utah not having been determined by the Decree of 1914, the State in this action is entitled to have its defense fully considered and the record in the Milner case cannot "be evidence against it for any purpose touching the merits of its claim".

In *Carr* v. *United States*, 98 U. S. 433, 437 (1878), the United States filed a bill to quiet title to certain lots in the City of San Francisco. The appellants relied largely on judgments rendered in the State courts against the agents of the Government having possession of the land. It appeared that the United States District Attorney for the District of California had appeared for the defendants in these actions. It was therefore contended that this made the United States a virtual party to the actions and "that by the law of California a judgment in ejectment is an estoppel; and that where a tenant or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action * * *."

But again this argument was rejected:

> "Whilst we concede that this may be the law of California as it regards private citizens who are landlords, we are not satisfied that the same law can be applied to the government of the United States. We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no State can pass a law, which would have any validity, for making the government suable in its courts."

The United States in this case relies almost entirely on judgments against certain alleged agents of the State of Utah. It is contended that the State is a virtual party to the action because it had notice of the action and did not intervene. But this argument would compel a State to submit to suit in a District Court. Not only is it fundamental law that the Government cannot be sued in the State Courts except by its own consent, but also that a

State may not be sued by the United States in a District Court without its consent.

See also *Iron Cliffs Co.* v. *Negaunee Iron Co.*, 197 U. S. 463 (1904); *United States* v. *Lee*, 106 U. S. 196 (1882); *Hussey* v. *United States*, 222 U. S. 88 (1911); *Hopkins* v. *Clemson Agricultural College of S. C.*, 221 U. S. 636 (1910); *Goltra* v. *Weeks*, 271 U. S. 536 (1925); *McClellan* v. *Carland*, 217 U. S. 268 (1909); *Scranton* v. *Wheeler*, 179 U. S. 141 (1900).

Inasmuch as the State of Utah was not a party in the Milner action and since it did not intervene it is apparent, on the authority of the cases cited, that the State is not concluded or estopped by the Decree of 1914.

B. The State of Utah is not concluded or estopped by the decree of 1914 by reason of the "peculiar circumstances of this case."

The Circuit Court of Appeals held that "It is therefore our conclusion that, under the peculiar circumstances of this case and under the doctrine of the *Williams* case (*Williams* v. *United States*, 138 U. S. 514 (1891)), the State is bound, in equity, by the decree of 1914". Its reasons for this conclusion are stated as follows:

> "The state intervened, and prays that its mortgage be adjudged a lien on the lands. It asserts that it was not a party to the Milner suit, and it was not; it concludes that it is not bound by the decree therein. But the conclusion does not follow. The state has parted with the title; the interest it now claims is a mortgage, taken from the Carbon County Land Company. As such mortgagee, it holds under that company; it cannot assert that it acquired its mortgage without knowledge of the infirmity of its grantor's title, and is not therefore entitled to the protection afforded a bona fide purchaser; as a privy

in title it is bound by the decree under familiar rules.

"The argument for the state is predicated upon the assumption that it is an ancester in title to the Carbon County Land Company, rather than a privy It is doubtful if this is a fair assumption, since the state has seen fit, for purposes of its own, to part with its title unconditionally, and take back a mortgage. But assuming that the holder of a purchase-money mortgage has the same rights as one who has retained the title and merely contracted to sell, we come to the same conclusion. The government did not join the state, which then was innocent of intentional wrong, as a party defendant in the Milner case, but followed the procedure approved in Williams *v.* United States, 138 U. S. 514. * * * But it did serve upon the state, through its Land Board, a copy of the bill of complaint the day after it was filed. That bill alleged the facts as to the misrepresentation, and further 'that all of the aforesaid certified selections of the aforesaid lands should be declared null and void and of no effect, and all the conveyances by which any of the defendants claim right of possession or title to said lands herein described, should be set aside and held for naught, and complainant should be fully restored to the possession of said lands, and all clouds upon the title removed therefrom.' It was also cited to the decision of the Supreme Court in the Williams case, which held that a state, in [illegible]lar situation, might intervene, or pursue the more dignified course of disclaiming any interest in the controversy and conforming its subsequent conduct to the decree of the court. The State of Utah followed neither course; it did not intervene; neither did it conform. It is therefore our conclusion that, under the peculiar circumstances of this case and under the doctrine

of the Williams case, the state is bound, in equity, by the decree of 1914'' (46 F. (2d) 980, 986).

It appears from this statement that the decision of the Circuit Court of Appeals rests upon the following propositions:

(1) The State of Utah is bound by the Decree of 1914 as a privy in title of, and holding title under, the Carbon County Land Company, a party to the *Milner* case.

(2) Under the doctrine of the *Williams* case the State of Utah is bound by the Decree of 1914.

These propositions will be considered in the order indicated.

(1) The State of Utah is not bound as a privy in title of the Carbon County Land Company.

The Circuit Court of Appeals held in effect that the State of Utah claimed under the Carbon County Land Company and was bound by the Decree of 1914 as a privy in title.

The pertinent facts are these:

On February 10, 1920, the State of Utah issued to the Carbon County Land Company its patent to the 5,564.28 acres of land involved in this suit. The entire purchase price of $556,428 was payable as follows: $100,000 on or before January 1, 1930; $200,000 on or before January 2, 1940; and $256,428 on or before January 2, 1950. This indebtedness was secured by a purchase money mortgage covering the entire amount of the purchase price. The mortgage was issued as part of the transaction involving the purchase and sale of these lands.

In this regard the Circuit Court of Appeals has assumed that the owner of such a purchase money mortgage is bound

by a prior judgment against its mortgagor. No cases are cited in support of this conclusion.

It appears to be clearly established, however, that a purchase money mortgage executed as a part of a transaction involving the sale and transfer of real property excludes any claim, lien or judgment against the mortgagor which would otherwise have attached. See *Mayburry* v. *Brien*, 15 Pet. (U. S.) 20 (1841); *Jones on Mortgages*, 8th Edition, Volume 1, Section 584 and cases there cited. It is therefore apparent that the interest of the State of Utah in the lands cannot be divested on the theory that its title is subsequent in time and interest to that of the Carbon County Land Company.

(2) The State of Utah is not concluded or estopped by the decree of 1914 by reason of the application of the doctrine announced in the *Williams* case.

The Circuit Court of Appeals held that "under the peculiar circumstances of this case and under the doctrine of the *Williams* case, *supra*, the State is bound, in equity, by the decree of 1914".

The case of *Williams* v. *United States*, *supra*, p. 26, involved land certified by the Secretary of the Interior to the State of Nevada. The appellant, Williams, acquired this land from the State. The United States then filed its bill against Williams alleging that the lands were improperly certified to the State and that the State's contract with the appellant transferred nothing to him and praying for a cancellation of the contract between Williams and the State of Nevada and an adjudication that Williams had no title or interest in and to the lands. A decree was entered divesting Williams of title and directing him to surrender up for cancellation all contracts for the purchase of land which he had with the State of Nevada.

It was urged at the trial that the Circuit Court was without jurisdiction since an indispensable party, the State of Nevada, had not been joined in the action. With respect to this contention this Court stated:

> "* * * The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government. The jurisdiction of the Circuit Court over this bill was properly sustained" (p. 516).

It is admitted that this language is authority for the proposition that Utah was not an indispensable party in the *Milner* suit. It does not mean, however, that the State of Utah must either (1) intervene, or (2) conform its conduct to the decree of 1914.

The language used by this Court states clearly and unequivocally that under the facts of the *Williams* case the State of Nevada, even though not bound by the decree entered in that case, might have been justified in voluntarily conforming its conduct to the decree of the Court. The

facts of this case, however, disclose no similar reason why the State of Utah should conform its subsequent action to the Decree of 1914. When the *Milner* suit was commenced the State of Utah was advised by the Special Assistant to the Attorney General, who commenced and carried on the litigation, that the purpose of the United States in bringing the action *was not to destroy but to protect the title* of the State of Utah and that, if the United States were successful, title to the land would vest in the State. Moreover, in this case it is clear that whatever the legal consequences of the action of the State in applying for the lands there was no intentional fraud on its part. There was no exposure of commercially valuable coal on these lands at the time they were certified to the State. At that time the rule of the Land Department was to the effect that lands cannot be classed as coal lands unless commercially valuable coal is exposed in each legal subdivision of forty acres exposed for sale. The affidavits upon which the State and the Department of the Interior relied were in line with these decisions. It was only as a result of a later decision of this Court that the rule relied upon was changed. There is, moreover, no evidence in this record to show that, in fact, the State or its agents had actual knowledge that coal underlay these lands.

Nor can it be maintained that the claim of the State of Utah is without substance and based upon technicalities. The State of Utah takes the position that it had a substantial property interest in the lands at the time of the entry of the decree of 1914 and that it has such an interest at the present time.

In the answer of the United States to the complaint in intervention of the State of Utah in this case it is alleged that, "payments, as required under said contracts, were

made as therein provided" (R. 91). This allegation is deemed denied under the Equity Rules (Federal Equity Rules, Rule 31). The United States, however, did not undertake to establish at the trial that the State of Utah had been fully paid. Consequently the record does not show what part of the purchase price was actually received by the State. It is apparent however that the full amount of the purchase price would not have become due and owing to the State of Utah until ten years from the date of the certificates of sale or many years after the commencement of the suit by the United States against the Milners and their assignees (*supra*, p. 9, R. 328-339). It does appear from the record, however, that the applicants were not "to make payment in full for such land and demand the issuance of patent thereto until their rights to acquire title to said lands are adjudicated" (R. 266).

In view of the foregoing it is submitted that the State is now the owner of a substantial property interest in the lands and that the United States has introduced no proof in support of its allegation that the State of Utah was paid in accordance with the terms of its contracts with the Milners.

II.

This suit by the United States against the State of Utah is barred by the operation of the Statute of Limitation.

In its counterclaim in this suit the United States prayed that the title of the United States in and to the lands involved in this suit be quieted as against all claims and demands of the State of Utah and, in the alternative, that

the certifications made to the State of Utah be delivered up and cancelled.

The State of Utah filed its replication, pleading, among other things, that the suit was barred by the provisions of Section 8 of the Act of March 3, 1891 (R. 96).

Section 8 of the Act of March 3, 1891, Chapter 561, 26 Stat. 1095 (U. S. C. A. Title 43, Section 1166), provides:

> "Sec. 8. That suits by the United States to vacate and annul any *patent* heretofore issued shall only be brought within five years from the passage of this Act, and suits to vacate and annual (annul) patents hereafter issued shall only be brought within six years after the date of the issuance of such patents".

This section was later amended by the Act of March 2, 1896, and in determining the meaning of the word "patent" as used in Section 8, the two statutes should be read together.

Section 1 of the Act of 1896 provides as follows:

> "* * * That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided,* That no suit shall

> be brought, maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry."

The lands with which this suit is concerned were conveyed to the State of Utah between 1901 and 1904 by certifications of the Secretary of the Interior. The Government now alleges that the certifications were obtained as a result of a material misrepresentation of the facts as to the character of the land.

Assuming *arguendo* that such fraud may be constructively imputed to the State of Utah, it is apparent that the United States had knowledge of the fraud when it commenced suit against the Milners in 1907. No material facts have been subsequently disclosed and the Government in this case relies largely upon the same evidence of fraud submitted in the *Milner* case.

The present action was commenced on May 16, 1924, or about twenty years after the date of the last certification of title to the State, seventeen years after the commencement of the *Milner* suit in 1907, and approximately ten years after the entry of the Decree of 1914. Prior to the commencement of this suit no action was taken by the Government to annul or in any way adversely affect the legal title of the State of Utah. It is therefore apparent that the period of limitation prescribed by the Act of 1891 has run.

The Court below held, however, that as against the State of Utah this is an action to impress a trust on such title as the State has in aid of the 1914 Decree and that the limitation of the Act of 1891 does not apply to such an

act in aid of a Decree. It is nevertheless clear that as against the State of Utah, this is not a suit in aid of the 1914 Decree, for Utah is not bound by that decree. It is an original and independent action by the United States against the State of Utah.

The limitation of Section 8 of the Act of 1891 applies to suits "to vacate or annul patents". The State of Utah acquired title to these lands by certification and not by patent. It is submitted, however, that the word "patent" as used in the Statute of Limitations includes both "patents" and "certifications".

In support of its contention that this suit is barred by operation of the limitation prescribed by the Act of 1891, it is urged that:

1. This Court has in effect determined that the word "patent" as used in the Act of March 3, 1891, includes both "patents" and "certifications".

2. The General Land Office of the Department of the Interior, both before and after the passage of the Act of 1891, has consistently employed the word "patent" to include both "patent" and "certification".

3. Congress has repeatedly employed the word "patent" to include both "patents" and "certifications".

4. The United States may not avoid the bar of the Statute of Limitations by bringing suit to recover the land by impressing a trust on its title.

We shall discuss these propositions in the order indicated.

1. This Court has held in effect that the word "patent" as used in the Act of March 3, 1891, includes both "patent" and "certification".

In the case of *United States* v. *Winona & St. Peter Railroad Co.*, 165 U. S. 463 (1896), this Court held that the word "patent" as used in the Act of 1896 *included* "certification". This holding seems controlling in the case at bar.

The Act of 1896 supplemented and amended Section 8 of the Act of 1891. In amending Section 8 Congress again employed the word "patent". It is not probable that the word patent was intended by Congress to have one meaning in Section 8 and an entirely different meaning in legislation amending that section.

In the *Winona* case, Mr. Justice Brewer, speaking for a unanimous Court, said:

> "Thus in the Act of 1891 it provided that suits to vacate and annul *patents* theretofore issued should only be brought within five years and that as to *patents* thereafter to be issued, such suits should only be brought within six years after the date of issue. Under the benign influence of this statute, it would matter not what the mistake or error of the land department was, what the frauds and misrepresentations of the patentee were, the *patent* would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the land department. The Act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that Act. It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold

> titles arising under *certification* or *patent* by providing that after a certain time the Government, the grantor therein, should not be heard to question them" (p. 476). (Italics supplied.)

This statement obviously has reference to Section 8 of the Act of 1891, as well as to the Act of 1896. It clearly indicates that the word "patent" includes "certification". Mr. Justice Brewer then referred to the following provision of the Act of 1896:

> "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

The Court then stated:

> "We are of the opinion that Congress intended by the sentence we have quoted from the Act of 1896 to confirm the title which in this case passed by certification to the State" (p. 477).

In other words, the Court unanimously declared that the limitations of the two acts apply to certifications as well as patents, for if there were any legal distinction between patents and certifications, the limitation of the Act of 1896 could not have been applied to the land in question as it had been certified to the State of Minnesota.

See also *Deweese* v. *Reinhard,* 165 U. S. 386 (1896); *Shaw* v. *Kellogg,* 170 U. S. 312 (1897); *Langdeau* v. *Hanes,* 88 U. S. 521 (1874); *Curtner* v. *United States,* 149 U. S. 662, 675 (1892); *McCreery* v. *Haskell,* 119 U. S. 327 (1886); *Frasher* v. *O'Connor,* 115 U. S. 102 (1884).

The opinion of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Kern River Company,* 264 Fed. 412 (1920), is apparently inconsistent with the state-

ment of this Court in the *Winona* case (*supra*, p. 36). In the *Kern River* case the Circuit Court stated that:

> "It is a well-established rule that statutes of limitation do not run against the sovereign, in the absence of some express statutory provision to the contrary, * * *. And had Congress intended that the bar of the statute should apply not only to patents but to all legislative grants, it would have so provided in express terms. * * * " (p. 416). See also *United States* v. *Amalgamated Sugar Co.*, 48 F. (2d) 156 (1931).

On appeal to this Court the decree of the Circuit Court of Appeals was modified and affirmed. The decision of this Court, however, did not rest upon the bar of the Statute of Limitations and did not touch upon the question whether the word "patent" included "certification" (257 U. S. 147 (1921)). The language of the Circuit Court is therefore not controlling in this case.

On the authority of the *Winona* case and the decisions of this Court which are cited above, it is submitted that the word "patent" as used in the Act of 1891 includes "certifications" and that this suit by the United States against the State of Utah is barred by operation of the limitation of that Act.

2. The General Land Office of the Department of the Interior, both before and after the passage of the Act of 1891, has consistently employed the word "patent" to include both "patent" and "certification".

The practice of the General Land Office of the Department of the Interior has been entirely consistent with the holding of this Court in the *Winona* case, *supra*. It was there established that the word "patent" includes both "patent" and "certification".

The following decisions of the General Land Office are given as examples of the way in which the Department of the Interior has interpretated the meaning of the word "patent".

In *Smith* v. *Portage Lake and Lake Superior Ship Canal Co.*, 11 L. D. 475 (1890), decided one year prior to the adoption of the Act of 1891, it was stated that:

> "The granting act contains no provision requiring the issuance of patents for the land selected but simply said that such selections shall be made by an agent or agents appointed by the State subject to the approval of the Secretary of the Interior. This approval is the only act required to divest the Government of the title to the land selected and to invest that title in the State *and it is therefore the equivalent of patent.*" (Italics supplied.)

Similarly in *Cole* v. *State of Washington*, 37 L. D. 387 (1909), the word patent was held to include certification. In that case the plaintiff and others claimed lands which had been certified by the United States to the State of Washington. The claim was refused on the ground that certification was equivalent to patent and that title had therefore been conveyed to the State. The opinion states:

> "Moreover, it has been repeatedly held by the department that where patent is not required by the statutes, certification is equivalent thereto and the validity thereof can only be questioned in the courts * * *"
>
> "From this it will be seen that the court regards certification as equivalent to patent and that where limitation is imposed by Congress *to the institution of suit to cancel patent the same limitation applies when in the absence of patent, certification is equivalent thereto.*" (Italics supplied.)

See also *Garriques* v. *Atchison, Topeka & Santa Fe R. R. Co.*, 6 L. D. 543 (1888); *Iowa Railroad Land Co.* v. *Sloan*, 9 L. D. 597 (1889).

This Court has recently recognized that:

> "* * * in the interpretation of a doubtful or ambiguous statute the long continued and uniform practice of the authorities charged with its administration is entitled to great weight and will not be disturbed except for cogent reasons." *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 757 (1930).

It seems therefore that the practice of the General Land Office of the Department of the Interior is persuasive that the word patent, as used by the Act of 1891, includes "certification" as well as "patent".

3. Congress has repeatedly used the word "patent" to include both "certification" and "patent".

A review of Congressional legislation dealing with land grants indicates that Congress has repeatedly employed the word "patent" to include both "certification" and "patent". This history suggests that the Congress intended Section 8 of the Act of March 3, 1891, to have application to certifications as well as patents.

When the Department of the Interior was created in 1849, the Secretary of the Interior assumed supervision of and control over the General Land Office. By the Act of June 19, 1878, it was provided that all patents should be signed by the President and countersigned by the Recorder of the General Land Office. Certifications, however, were signed by the Secretary of the Interior. Although as a result of this statute a slight distinction was drawn between a formal patent and a certification by the Secretary of the Interior, the Courts nevertheless have continued to

hold that a certification has the same force and effect as the more formal patent. *Frasher* v. *O'Connor*, 115 U. S. 102 (1884). Moreover, Congress has repeatedly employed the word "patent" to include "certification".

In 1887 the Congress of the United States enacted legislation authorizing and directing the Attorney General to commence proceedings to cancel title to railroad land "erroneously or fraudulently certified or patented". 24 Stat. 556. Under the doctrine that lapse of time is not a bar to a suit brought by the United States, this legislation had the effect of leaving the validity of the title to such land in perpetual doubt.

The Act of March 3, 1891, was passed to remedy this situation. Section 8 of that Act provides:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years of the passage of this act, and suits to vacate and annual (annul) patents hereafter issued shall only be brought within six years after the date of the issuance of such patents * * *."

In 1896 President Cleveland in his message to the Congress pointed out that there were many outstanding disputes involving the validity of land titles derived from the United States and urged in view of this fact that Section 8 of the Act of 1891 be repealed. He stated:

> "In these circumstances, it seems to me that the Act of 1891 should be so amended as not to apply to suits brought to recover title to land certified or patented on account of railroad or other grants." Congressional Record, vol. 28, Part 2, p. 1762. (Appendix I.)

While this recommendation was not followed, the statement is significant as showing that the President of the United States assumed that the word "patent" as used in Section 8 of the Act of 1891 included "certification".

That this was also the opinion of the Land Office is seen in the letter of Commissioner Lamoreaux to the Secretary of the Interior. The Commissioner says:

> "Under the provisions of Section 8 of the Act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.
>
> * * * * * *
>
> "It is clear, therefore, that the time within which the United States may bring suit for the recovery of land erroneously certified or patented under these grants, must be extended * * *." Congressional Record, vol. 28, Part 2, p. 1763. (Appendix II.)

This view was adopted by the Secretary of the Interior, who, in his letter to President Cleveland, stated:

> "Under these circumstances, it seems to me that the Act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants." Congressional Record, vol. 28, Part 2, p. 1762. (Appendix III.)

Following the message of President Cleveland, Congress passed the Act of March 3, 1896 (29 Statutes at Large, 42, Chap. 39), providing, *inter alia*, that any suits brought by the Government to vacate and annul any patents to lands

heretofore erroneously issued under a railroad or wagon road grant could only be brought within five years from the passage of the Act and any suits to vacate and annul patents thereafter issued could only be brought within six years from the date of the issuance of such a patent.

In the first paragraph the word "patent" is used. No reference is made to "certification". But Section 2 speaks of "lands erroneously patented or certified" and Section 3 says that "if at any time prior to the institution of suit by the Attorney General to cancel any patent or certification of lands erroneously patented or certified", and later "or the corporation . . . for whose benefit the patent was issued or certification was made".

Reading this legislation and bearing in mind the purposes for which Section 8 of the Act of 1891 and the supplementary bill of 1896 was passed, no other conclusion can be reached than that Congress intended to provide some orderly process by which the respective rights of the Government and the grantees could be determined and in addition fix a time when all litigation in respect to government land grants would cease. It would be illogical to believe that Congress intended that controversies with regard to those lands acquired by a formal patent only should be extinguished and that title to lands acquired by the less formal grant—namely, certification—should be open to perpetual controversy.

The legislation dealt with the grant of land itself, not merely the written evidence of it. That this was the opinion of all those concerned with the passing of the bill, the President, Congress and the Land Department, is found in the Report of the House Committee with regard to the Act of 1896. The Report said:

"There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require ten years or more to adjust the grant under the Act of 1887 [which dealt with lands erroneously patented or certified], and therefore thought the limitation should be extended ten years . . ."

* * * * * *

"To remedy these defects the Act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust them within so short a time, we think that a bill giving five years longer limitation ought to pass, but we do not believe that this extension of time ought to affect bona fide purchasers; that as to them the limitation of the Act of 1891 ought to operate as a final bar when the time first limited shall expire" (House Report 253, 54th Congress, 1st Session). (Appendix IV.)

It should be remembered that the Act in relation to bona fide purchasers spoke of lands erroneously patented or certified. It seems, therefore, that Congress intended the limitations to extend to all land grants—not merely formal patents.

The interpretation of the word "patent" as used in these acts, as a general and inclusive term, received legal sanction in the case of *United States* v. *Winona & St. Peters Railroad Co., supra,* where this Court said that the acts in question showed the purpose of Congress was "to uphold titles arising under certification or patent by providing that after a certain time the Government, the grantor therein, should not be heard to question them", and the land office

itself has consistently followed this ruling (*Cole* v. *State of Washington,* (1909) 37 L. D. 387).

Consequently, we find the Congress, The Department of the Interior, which proposed the bill, President Cleveland, who brought it to the attention of Congress, and the Supreme Court, which gave it final legal sanction, agreed on the same interpretation of the Act—namely, that the word "patent" as used in Section 8 of the Act of 1891, and the Act of 1896, applies to and includes the more informal conveyance, the certificate, as well as the conveyance by the formal "patent".

4. In this case the United States may not avoid the bar of the Statute of Limitations by bringing suit to impress the lands with a constructive trust.

The Court below took the position that the Statute of Limitations is not a bar to the bringing of this suit because this is an action to impress the lands with a constructive trust and is not a suit to vacate or annul a patent.

It is believed that the position taken by the Circuit Court does not give due regard to the effect of the bar of the Statute of Limitations relied upon in this case.

In *United States* v. *Chandler-Dunbar Co.,* 209 U. S. 447, 450 (1908), this Court discussed the effect of the limitation of the Act of 1891. In that case it appeared that the United States had filed a bill to remove a cloud upon its title to certain lands. The defendant set up as a bar the limitation set forth in Section 8 of the Act of 1891. The United States replied that the action was not one to vacate and annul a patent but a suit to quiet title. In denying this contention this Court stated:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. *Leffingwell* v. *Warren,* 2 Black, 599, 605; *Sharon* v. *Tucker,* 144 U. S. 533; *Davis* v. *Mills,* 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See *United States* v. *Winona & St. Peter R. R. Co.,* 165 U. S. 463, 476."

See also *United States* v. *Winona, supra; Elmendorf* v. *Taylor,* 10 Wheat. 152 (1825).

It is apparent from these decisions that the Statute of Limitations pleaded in this case operated as a conveyance to the State of Utah of all of the right, title and interest of the United States in and to these lands, and that it divested the United States of its equitable and legal title. It is a fundamental conception of equity that no one can impress a trust on real property who does not own the equitable estate. See Pomeroy's Equity Jurisprudence, 3rd edition, Section 155. Courts of equity have extended the fundamental principle of trusts—that is, the principle of a division between the legal estate in one and the equitable estate in another—only for the purpose of protecting rights of property. It is apparent in this case, however, that the United States was divested by the Statute of Limitations of all property rights, legal as well as equitable, which it might otherwise have retained in these lands. Consequently this action may not be sustained as a suit to impress a trust upon the interest of the State in and to these lands for the reason that the United States has no legal or equitable estate in this property and conse-

quently the United States has no property right which a court of equity may protect.

The Circuit Court of Appeals further relies upon *Lockhart* v. *Leeds*, 195 U. S. 427 (1904) and *United States* v. *New Orleans Pacific Railway Co.*, 248 U. S. 507 (1918).

Lockhart v. *Leeds* does not appear to throw any light upon the question of the application of the statute. The *New Orleans Pacific Railway Co.* case seems not to be in point for the reason that in that case the United States was suing to protect the rights of third parties, namely, homestead claimants, and was not suing to recover land which it owned or claimed. It is apparent that the statute has no application to such a case for, "the object of that statute is to extinguish any right the Government may have in the land which is the subject of the patent—not to foreclose claims of third parties". *Cramer* v. *United States*, 261 U. S. 219, 233 (1922); see also *La Roque* v. *United States*, 239 U. S. 62 (1915).

It is therefore submitted that the word "patent" as used in the Act of 1891 includes "certifications" and that this suit by the United States against the State of Utah is barred by operation of the limitation of that Act.

III.

Insofar as the State of Utah is concerned the lands were not obtained as a result of a material misrepresentation of the known facts as to the character of the lands.

It has been held that in a legal sense the Milners and their assignees "fraudulently obtained these lands from the United States" (R. 625). The State of Utah, however,

was not a party to the action in which this decision was reached. Consequently the adjudication in the *Milner* case does not estop or bind the State of Utah and the question as to whether the certifications were fraudulently obtained by the State is still open in this case.

In support of the allegations of the United States that the State of Utah obtained these lands as a result of fraudulent misrepresentations, the defendants introduced in this suit the record in the *Milner* case and the testimony given by Joseph A. Taff in that case. The State objected to the admission of this evidence. The Court overruled this objection and allowed exceptions (R. 175). It is submitted that since the State of Utah was not a party to the *Milner* suit this record is not admissible against the State "for any purpose touching the merits of its claim" and that pages 106 to 262 inclusive of the Record may not be considered in support of the allegation of the United States. *Tindal* v. *Wesley, supra.* Since the Court below relied largely upon the Record of the *Milner* case as proof that the lands were fraudulently acquired by the State it seems that the error was clearly prejudicial.

But, assuming *arguendo* that the Record in the *Milner* case and the testimony of Mr. Taff may properly be used as evidence against the State of Utah, there is no proof that, as to the State of Utah, the lands were, in fact, known mineral lands at the time these certifications were made. There was no exposure of commercially valuable coal on the land selected. The rule of the General Land Office in effect at that time was that without such exposure the lands could not be listed as mineral. It was not until ten years after the certifications were made that this court in the *Diamond Coal Company* case, *supra,* rejected this rule of

the General Land Office and declared that the character of mineral land may be established by any satisfactory evidence, including geologic inference. It was in reliance upon a retroactive application of this rule of law that these lands were held to be known mineral lands at the time they were certified to the State.

The result is that when the State obtained these lands from the United States, the certifications by the State were not tainted with any intentional or known fraud judged by existing standards. The lands were represented to be non-mineral in character and were in fact grazing lands. It is submitted that the quality of an act is to be determined by the standards of conduct in force at the time the act is done and that the lands were not fraudulently acquired by the State of Utah. The fact that it has been determined by the lower courts that the Milners and the Carbon County Land Company obtained the land as a result of fraudulent affidavits does not constitute a decision on the merits as to the State of Utah.

The language used by this court in the *Wiona* case, *supra*, applies fairly to the equitable position of the State of Utah in this case:

> "* * * It belonged to the Government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the Government now asks to have that set aside and the title to these lands restored. No fraud or wrong is imputable to the company. No effort to secure a misconstruction by the land department, but only an acceptance of the then settled rule of construction and the taking of the lands which, under such construction, it was entitled to receive. Conceding that that construction was er-

roneous, yet it was one made by the officers of the department charged with the duty of administering the grant and determining what lands did and what did not pass, the only tribunal to which the company could then apply, and upon whose rulings it was bound to act. Many years have passed since the certification, and since the company in reliance upon the title it believed it had acquired has disposed of the lands, and other parties have become interested in and have dealt with the lands as private property. Contracts have been entered into, suits maintained—carried even to this court—and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts" (p. 474).

Conclusion.

It is respectfully submitted that the decree of the Circuit Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted,

WILLIAM J. DONOVAN,
Attorney for Petitioner.

GEORGE P. PARKER,
Attorney General of the
State of Utah.

RALSTONE R. IRVINE,
Of Counsel.

Appendix I.

Message of the President of the United States.*

To the Congress:

I desire to invite attention to the necessity for prompt legislation in order to remove the limitation of the time within which suits may be brought by the government to annul unlawful or unauthorized grants of public lands.

By the Act of March 3, 1887 (24 Stats., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted, and it is provided, if it shall appear, upon the completion of such adjustment or sooner, that the lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented, and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute in the proper courts necessary proceedings to restore title to said lands to the United States. The demands made under this act have been numerous, and in some cases have resulted in the reinvestment of title to the lands in the United States upon demand, but in most cases the demand has been refused and suits have been necessary.

The work of adjustment has been unavoidably slow. The said act makes provision for the reinstatement of entries erroneously cancelled on account of railroad withdrawals, and upon certain conditions, provides for the confirmation of titles derived by purchase from the companies of lands shown to be excepted from the grants. It contemplates a disposition of every tract described by the granting act, situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those contracts shown to be erro-

* Congressional Record, vol. 28, Part 2, p. 1762.

neously certified, and the determination for what contracts lost to the grant indemnity is to be allowed.

It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads, the grants for which conflict or overlap, be finally disposed of, so that a proper disposition of the land can be shown in the adjustment. While adjustments have proceeded with the utmost rapidity consistent with a due regard for the rights of the settlers, of the United States and the railroad companies, and while to this end the force of adjusters has been largely augmented in the General Land Office, many of the grants yet remain unadjusted.

In some of the grants, notably the corporation grants, the lack of surveys up to the present time made the completion of the work impossible.

Decisions rendered by the Interior Department in numerous conflicts have been carried into the courts. A construction of the Interior Department has generally been sustained when final determination has been reached, but many of the cases are still pending in the courts, not yet having been decided. Some of these cases, while involving immediately the title to only one particular tract, will, when decided, furnish a rule of construction to control the disposition of the title to thousands of acres of other lands in the same situation. Until the courts pass upon these questions final adjustments cannot be made.

By section 8 of the act of March 3, 1891 (26 Stats., 1099) it is expressly enacted that suits by the United States to vacate and annul any patent theretofore issued "shall only be brought within five years from the passage of this act". This period of five years will expire on the 3rd of March, 1896. Of course, no suit by the United States to secure the cancellation of a patent in this class of cases after that date would be effective. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal, in accordance with the provisions of the act of March 3, 1887. Before the

expiration of this period the statute would bar the right of recovery by the government, and the benefits of anticipated favorable decisions of the courts would be lost, so far as they might determine the character and disposition of grants similar to those directly involved in pending cases.

It will be readily seen that if this act of limitations is to remain on the statute books, the portion of the adjustment act referred to would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by law.

Legislation establishing limitations against the right of the government to sue is an innovation not entirely consistent with the general history of the rights of the government, for it has uniformly been held that time did not bar the sovereign power from the assertion of a right.

The early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees which later decisions of the courts and of the Department have not sustained. It seems clear that the further progress of adjustments will develop facts and transactions in connection with these land grants which ought to be the subjects of legal examination and scrutiny before they are allowed to become final and conclusive. The government should not be prevented from going into the courts to right wrongs perpetrated by its agents or any other parties, and by which much of the public domain may be diverted from the people at large to corporate uses.

In these circumstances, it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully urge upon Congress speedy action to the end suggested, so that the adjustment of these grants may proceed without the interposition of a bar, through lapse of time, against the right of recovery by the government in proper cases.

GROVER CLEVELAND.

Executive Mansion, January 17, 1896.

Appendix II.

Letter of Commissioner Lamoreux,* Department of the Interior, General Land Offices.

Washington, D. C., December 18, 1895.

Sir:

On March 3, 1891, an act of Congress, entitled "An act to repeal the timber-culture laws, and for other purposes," was approved by the President. (26 Stat., 1095.) Section 8 of said act provided, among other things, "that suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issue of such patents". And by another act, approved the same day (26 Stat. L., 1093), entitled "An act to amend section 8 of the act approved March 3, 1891, entitled 'An act to repeal timber-culture laws, and for other purposes'," the same proviso was enacted. It will be observed that this section makes no exception, but applies to all patents.

By act of March 3, 1887 (24 Stat. L. 256) directions were given for the adjustment of all grants by Congress to aid in the construction of railroads, and for the recovery by the United States of title to lands which from any cause have been erroneously certified or patented under such grants, and said act requires that the adjustments be made in accordance with the rulings of the United States Supreme Court. Therefore, as conveyances under these grants date as far back as 1850 and were made under various court and departmental rulings, it is not surprising that many of said conveyances have been and will be found, under the construction now given such grants by the Supreme Court, to have been erroneous.

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* Congressional Record, vol. 28, Part 2, p. 1763.

A number of these grants have been examined with a view to their adjustment, and rules have been laid to show cause why suits should not be instituted for recovery of title in some cases, and demands for reconveyance have been made in others, but very few have been finally adjusted and closed, not more than a dozen; and most of these examinations, nearly all in fact, were made prior to the rulings of the United States Supreme Court in the cases of *Mary Bardon* vs. *Northern Pacific Railroad* (145 U. S. 533) and *Whitney* vs. *Taylor* (158 U. S. 85) which so change the previous rulings of the court, as construed by this Department, as to make necessary a re-examination of all railroad land grants, excepting the few finally closed and some half dozen examined since the decision in the case of *Whitney* vs. *Taylor,* above referred to. The Department so held in its letters of July 18, 1895, in the case of the *St. Louis, Iron Mountain & Southern Railway Company,* and September 5, 1895, in the case of the *Burlington and Missouri River Railroad Company of Iowa.*

There are 79 land-grant railroads and 7 land-grant wagon roads.

Under the provisions of Section 8 of the act of March 3, 1891, as originally passed and amended as aforesaid, the time within which the United States can legally bring suit for the recovery of lands erroneously patented prior to March 3, 1891, will expire March 3, 1896, unless an extension be made by Congress.

The work of adjusting these grants is one of great magnitude and the division of the office charged with its execution is also charged with the consideration and determination of all questions relating to or arising out of conflicts between grants by Congress to aid in the construction of railroads, wagon roads, canals, and river improvements and rights of way over the public lands for railroads, canals, ditches, and reservoirs, and its current work must be kept up. It is also charged with the administration of the grant of desert lands to certain states.

It is clear, therefore, that the time within which the United States may bring suit for the recovery of land erroneously certified or patented under these grants must be extended or that the interests of the government, and in many instances those of private citizens, must suffer. I have accordingly the honor to suggest that Congress be asked to extend such time ten years, or until March 3, 1906, for lands patented prior to March 3, 1891, and ten years from date of patent for lands patented subsequent thereto.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

The Secretary of the Interior.

Appendix III.

Extract of letter from Secretary of the Interior Smith to President Cleveland.*

"Washington, December 27, 1895.

"Sir: I beg leave to invite your attention to the provisions of section 8 of the act of March 3, 1891 (26 Stat. L., 1099), where it is enacted that suits by the United States to vacate and annul any patents theretofore issued 'shall only be brought within five years from the passage of this act,' which, in my opinion and that of the Commissioner of the General Land Office, ought to be repealed. In order that you may fully understand the situation, I beg to submit the following observations:

By the act of March 3, 1887 (24 Stat. L., 556), the Secretary of the Interior is directed to adjust each of the railroad land grants which may be unadjusted; and it is provided if it shall appear, upon the completion of such adjustment, or sooner, that lands have been from any cause erroneously certified or patented by the United States to or for the use of a company claiming under any of said grants, it shall be the duty of the Secretary of the Interior to demand a reconveyance of the title to all lands so erroneously certified or patented; and on failure of the company to make such reconveyance within ninety days the Attorney-General is required to institute and prosecute, in the proper courts, necessary proceedings to restore title to said lands to the United States.

* * * * * *

The work of adjustment contemplates a disposition of every tract described by the granting act situated within the primary or granted limits; an inspection of each tract certified or patented to the company within such limit, to determine whether such certification or patenting was proper; the listing of those tracts shown to be erroneously certified, and the determination for what tracts lost to the grant indemnity is allowable.

---

* Congressional Record, vol. 28, Part 2, p. 1762.

It is necessary, in making such an adjustment, that all questions of conflicting claims, either between settlers and the road or between two roads the grants for which conflict or overlap, be finally disposed of so that a proper disposition of the land can be shown in the adjustment.

* * * * * * *

Of course, no suit by the United States to secure the cancellation of a patent in this class of cases after that date would amount to anything. Indeed, it is now too late to initiate proceedings looking to any such suit, inasmuch as demand has to be first made on the company, and thereafter ninety days must be allowed for compliance or refusal in accordance with the provisions of the act of March 3, 1887 (*supra*), before the expiration of which time the statute would bar the right of recovery by the Government.

* * * * * * *

It will be readily seen that if this act of limitations is to remain on the statute books the portion of the adjustment act of 1887, before cited, would be rendered nugatory. Indeed, there would be but little use in continuing the adjustment of many of the land grants, inasmuch as ascertained rights of the United States or of settlers could not be enforced by power of law. By this denial to the Government of the right to go into court and ascertain its rights the railroad companies would profit very largely, as it is a well-known fact, capable of abundant substantiation by the records of the Land Office, that the early adjudications of the Land Department construed the grants with a degree of liberality toward the grantees which, by later decisions, is declared not to have been warranted by law.

* * * * * * *

Under these circumstances it seems to me that the act of 1891 should be so amended as not to apply to suits brought to recover title to lands certified or patented on account of railroad or other grants. And I respectfully request that you urge upon Congress to take speedy action, as suggested, that there may be no delay in the adjustment of these grants and no bar, by lapse of time, against the right of recovery by the Government in a proper case."

Appendix IV.

REPORT*

(To accompany H. R. 5474)

On the 17th day of January, 1896, the President sent to Congress a message in relation to the expiration of the limitation provided in the Act of March 3, 1891. Under the Act of March 3, 1887 (24 Stat. L., 256) the Interior Department was directed to adjust all the various railway and other land grants as speedily as practicable and, whenever it was ascertained that lands had been erroneously patented, the law provided that actions should be brought to cancel the same.

Provisions are embraced in the Act of 1887 to protect settlers and purchasers by giving them preferential rights in case of the cancellation of their patents.

These proceedings, of necessity, caused much disturbance among land titles, and although the purpose involved was the laudable one of protecting the Government by correcting mistakes and overturning fraudulent patents, a sense of insecurity and loss of confidence in the integrity of patent titles became a serious drawback to the settlement and improvement of some parts of the country.

In order that all these questions might be speedily adjusted, and that any proposed litigation for the purpose of annulling patent titles should be promptly brought, the limitation act of 1891 was passed, requiring that all such suits as to patents already issued should be commenced within 5 years, or prior to March 3, 1896, and that as to patents subsequently issued suits to cancel the same should be brought within 6 years after the date of the patent.

The Commissioner of the Land Office, on the 18th of December, 1895, addressed a communication to the Secreta-

* House Report 253, 54th Congress, First Session; Congressional Record, vol. 28, Part 2, p. 1761.

of the Interior, suggesting an extension of time by amendment to the Act of 1891. The Secretary of the Interior communicated with the President upon the subject, recommending the repeal of the limitation altogether. Thereupon the President sent a message on the subject to Congress, asking for a repeal of Section 8 of the Act of March 3, 1891.

We will set forth in an appendix to this report the message and other communications above referred to.

The Committee on the Public Lands have patiently examined the whole subject and invited before them all persons interested in the question, as also the Assistant Attorney General for the Department of the Interior and the Commissioner of the General Land Office.

There has been a large variety of land grants which will be affected by the proposed extension of the limitation. The Commissioner of the General Land Office was of the opinion that it would require 10 years more to adjust the grant under the Act of 1887, and therefore thought the limitation should be extended 10 years.

In the adjustment of these grants, it is not practicable for more than from 2 to 4 clerks in the General Land Office to work at one time without having duplicates made of certain lists or records. With this small force the adjustment has slowly proceeded for the last 9 years, and over 60,000,000 acres still remain unadjusted. It appears, however, that by active diligence about 12,000,000 acres have been adjusted in the last year. At this rate the work could be completed in 5 years more.

But even if it could not be done with the present force, the Committee are of the opinion that duplicate copies of the leases and documents or records ought to be made to expedite this work, and that the time ought not to be extended more than 5 years.

While it is important that the rights of the Government should be cared for, and that a reasonable time for adjustment of these patented grants should be given, it is also of the highest importance that the validity of the Government

patents should be examined as speedily as practicable so that former settlers and those who wish to become settlers or purchasers of these lands may know that the Government patent issued by the highest authority of the nation shall be evidence of a final and complete character that the Government's title has been lawfully transferred.

Under existing law, and in the absence of any limitation, a settler may buy a home upon one of these grants, and after occupying it for years under the faith of a patent regularly issued and recorded, find himself made a party to a long, vexatious, and expensive litigation, and in the end be permitted to buy the land again from the Government or to enter it under the Homestead laws.

That such a thing may occur for a reasonable time is perhaps the necessary consequence of fraud and mistake in patents, but that such a condition should be kept open without limit is an intolerable blemish upon the titles purporting to come from the Government. If a private individual sells and conveys lands, and they pass into innocent hands, the purchaser is protected as against his grantor, and time will protect him against all comers. But as against the United States, in the absence of a limitation law, he is never secure and may be subjected to annoyance and expense and possible loss of his land at any time.

A private individual may have obtained a patent for a homestead, tree claim, or pre-emption claim, and, after selling the same, the purchaser, who has bought upon the faith of the Government patent, may be harassed by proceedings in the courts hundreds of miles away, with a possible appeal to the expensive forms of the court of appeals and the still more expensive and clogged tribunal of the United States Supreme Court.

To remedy these defects the Act of 1891 was enacted. On account of the large land grants involved, and the fact that it has not been found practicable to adjust them within so short a time, we think that a bill giving 5 years longer limitation ought to pass, but we do not believe that this

extension of time ought to affect bona fide purchasers; that, as to them, the limitation of the Act of 1891 ought to operate as a final bar when the time first limited shall expire.

But as to the original patentees, no great injustice will be done to them by extending the time 5 years longer, and within that time we think that the grants can all be adjusted. The shortness of this time, it is true, may put the Interior Department to some inconvenience, and it may involve some extra expense for clerical work, but the importance of bringing to an end all disputes upon the part of the Government as against its own patent titles is so evident as to need but little argument in its support.

Your Committee have prepared and presented a bill which will carry out the purposes outlined in this report, and we recommend its passage.

We cannot agree with the President that public policy requires that there should be no limitation as against the Government in these cases.

We have had unpleasant object lessons in many of the Spanish grants, whose limits are as elastic and uncertain as the Venezuelan boundary. The presence of these disputed titles has cast a blight over some of our most beautiful lands for more than a generation. There should be some time fixed when such a condition shall cease to exist.

The limitation may perfect titles in some instances founded in more or less fraud or mistake. So it happens with all such statutes, but universal experience has demonstrated the necessity of such statutes.

Most of the states of the Union have adopted statutes which will bind the states themselves. Such statutes have been found to work well. To require the Sovereign power to proceed in a reasonable time if it wishes to void or nullify its own acts is a just provision in behalf of its individual citizens. The absence of limitation excuses delays on the part of officials, and that which may be done at any time, however distant in the future, is much less likely to be attended to in the present.

We are informed that as to some of these land grants the greater part that has been patented has been sold to third persons. That was the very purpose of the land grants. It was not intended that these grants in aid of public improvements should be tied up indefinitely and withheld from settlement.

It was the theory of the projectors of such enterprises that these lands would be brought into markets by the building of railways and that the railway companies would be interested in selling them on long time at low prices and at low rates of interest to actual settlers who would furnish a carrying business for the new lines. It ought not to be the policy of the Government to harass or annoy one of these settlers by any litigation whatever.

The policy of making railway grants has been long since abandoned. The adjustment of those made should proceed with all reasonable speed so that the transactions may be closed.

The railway companies themselves have encouraged delay by failing to procure their patents in order to avoid local taxation. One of the purposes of the Act of 1891 was to encourage the patenting of such lands so that they might become subject to such taxation, and that their sale and settlement might be encouraged.

FILE COPY

DEC 30 19

IN THE

Supreme Court of the United States

October Term, 1931.

No. 42

STATE OF UTAH, INDEPENDENT COAL & COKE COMPANY and CARBON COUNTY LAND COMPANY,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF INDEPENDENT COAL & COKE COMPANY

MAHLON E. WILSON,
FRANK K. NEBEKER,
Attorneys for Independent Coal & Coke Company.

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POINT I. The State is not concluded or estopped by the decree entered in favor of the United States and against Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party. Neither is the Independent Coal & Coke Company bound or affected by such decree. (Argued) 29-36

POINT II. Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State and had the effect of conferring ownership on the State, and this ownership inures to the benefit of the Independent Coal & Coke Company. (Argued) 36-46

POINT III. The certifications obtained by the State from the United States in the years 1901-1904 were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character, and, second, because said land was not known to be mineral in character at any time, if ever, earlier than the year 1907. If, under the evidence, such land can be determined to be coal land, then determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made. (Argued) 46-52

POINT IV. The State took the grant from the United States, charged with the obligation of establishing and maintaining the Agricultural College and other institutions. This obligation constituted a valuable consideration. The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct and not through the Carbon County Land Company, and therefore the State's title inures to the benefit of the Independent Coal & Coke Company as to the 1120 acres of land. (Argued) 52-54

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IN THE

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF INDEPENDENT COAL & COKE COMPANY

STATEMENT.

This Court issued its writ of certiorari May 18, 1931 (R. 630), to review a judgment and decree of the United States Circuit Court of Appeals of the Tenth Circuit, dated January 14, 1931 (R. 626) (46 Fed. (2d) 980), reversing a judgment of the United States District Court for the District of Utah, dated June 11, 1929. (R. 97)

PROCEEDINGS IN PRESENT SUIT.

May 16, 1924, ORIGINAL BILL IN EQUITY filed by the United States in United States District Court for the District of Utah against Carbon County Land Company and Independent Coal & Coke Company and Carbon County. The purpose of the bill, as indicated by its prayer, is to have the defendant companies decreed to hold title to 5564.28 acres of land situated in Carbon County, Utah, in trust for the plaintiff, "subject only to the mortgage taken

by the State to secure the payment of the purchase price, which said mortgage, unless the State will surrender its claim, will form the subject of an independent suit between the plaintiff and the State in the Supreme Court of the United States." (Quotation from original bill of complaint, transcript of record on former hearing in this court, page 5.)

Carbon County had a tax lien on a portion of the lands, but the suit as to it was dismissed by the Circuit Court of Appeals of the Eighth Circuit. (9 Fed. (2d) 517)

Defendants made motions to dismiss, claiming a bar of the Statute of Limitations, to-wit: Section 8 of Act of March 3, 1891.

January 12, 1925, DECREE DISMISSING BILL. (Original transcript 24.)

There was then an appeal to the United States Circuit Court of Appeals of the Eighth Circuit.

November 21, 1925, DECREE OF UNITED STATES CIRCUIT COURT OF APPEALS OF EIGHTH CIRCUIT, reversing decree of District Court. (9 Fed. (2d) 517)

Thereupon defendants applied to this Court for writ of certiorari.

Up to this time the State of Utah had not been a party to this action, nor participated therein, but the State, by its Attorney General, then petitioned this Court for permission to file brief in support of petitions for writ of certiorari, setting up its purchase money mortgage to secure an indebtedness of $556,428. The petitions of the defendants and the State were granted March 22, 1926. (270 U. S. 639)

May 31, 1927, DECISION OF SUPREME COURT (majority opinion), affirming decision of Circuit Court of Appeals of Eighth Circuit and remanding case to District Court for the District of Utah for further proceedings. (274 U. S. 640)

December 9, 1927, AMENDED BILL OF COMPLAINT filed by United States. (R. 1 et seq.)

October 18, 1928, ANSWER OF INDEPENDENT COAL & COKE COMPANY filed (R. 21-35), avering ownership in Section 3 and the north half of Section 10 and the northwest quarter of Section 11, Township 13 South, Range 10 East, consisting of 1120 acres of land situated in Carbon County, Utah, and averring that it purchased said land on the 16th day of October, 1920, in the manner following: By transferring and delivering to the Carbon County Land Company 369,000 shares of its capital stock, having a par value of one dollar a share and an actual value of at least sixty cents a share, and by entering into an agreement with the State of Utah whereby the Company agreed to pay to the State the sum of $112,000, or $100 per acre, for said 1120 acres of land, and whereby the State agreed to release to it said 1120 acres of land upon payment to the State by said Independent Coal & Coke Company of said $112,000. (R. 22-23)

In its answer the Independent Coal & Coke Company admitted that while it knew that the suit between the United States and Milner, referred to in Paragraphs 3 and 4 of the amended bill, had been tried and determined, as is alleged in Paragraph 3 of said amended bill, it also knew and relied upon the fact that the State of Utah was not a party to that suit, and said defendant did not believe that the State of Utah was in any wise bound by that decree, or any part thereof; and said defendant further averred that the United States had, on or about the 8th day of January, 1907, represented to the State of Utah that it was no part of the purpose of said suit (referring to United States v. Milner) to [illegible]y wise disturb or affect the title of the State of Utah to the lands described in said suit and in said decree; and this defendant further averred that it knew the State of Utah had claimed ownership of these lands from the date of certification by the Government to the State up to and including February 10, 1920.

And the said defendant further averred that the 1120 acres above described were in part adjacent to and in part contiguous to other lands owned by the defendant herein; that the defendant was operating a large coal mine, and it knew that if the 1120 acres remained Government land, the fact of ownership by the Government would not in any wise disturb the operations of the defendant and its coal

mining properties; but if these lands were to be the subject of private ownership, and were to be sold to competitors, it would become intensely inconvenient and embarrassing to this defendant in the operation of its coal mines upon its other lands adjacent and contiguous to said 1120 acres. (R. 24) (See also Paragraphs 18 and 19 of said answer, R. 30-31.)

Defendant further averred that it had entered into possession of said lands in October, 1920; and made valuable improvements thereon; that said lands had been placed upon the assessment rolls for purposes of taxation by the State and by Carbon County, and that taxes had been levied upon said lands and paid by the defendant to the extent of $40,170.69. (R. 32) (This amount should be corrected and should read $39,949.53 for the years 1920, 1921, 1922 and 1923.) (No taxes paid since suit was started in 1924.)

October 22, 1928, COMPLAINT IN INTERVENTION filed by State of Utah by leave of Court. (R. 35 et seq.)

November 26, 1928, OBJECTIONS OF UNITED STATES to application of State to intervene overruled. (R. 46-47)

November 26, 1928, ANSWER OF CARBON COUNTY LAND COMPANY. (R. 48)

November 27, 1928, REPLICATION OF UNITED STATES to answer of Independent Coal & Coke Company, admitting that State of Utah acted innocently of any fraud in making selection of land involved. (See Paragraph 5, page 63.)

February 6, 1929, ANSWER AND COUNTERCLAIM of United States to complaint in intervention of State of Utah. (R. 70 et seq.) Counterclaim commences with Paragraph 16, Page 75 of the record. Among other things it is alleged in substance in Paragraph 29 that while the State of Utah intended no fraud, it was made "a potential factor" in a fraud committed by Milner and his associates, and that the Land Department had no "*jurisdiction*" to act upon the State's application to have the lists for the land certified. (R. 89) (Land Department had both duty and power.)

The prayer to this counterclaim is in substance as follows: that the Court decree that whatever title to lands involved passed to State was in turn passed by State to Carbon County Land Company, and that the same inured to the benefit of the plaintiff, and that the mortgage of the State and the tax deed be cancelled, and that the title of the United States be quieted as against the State; and, in the alternative,

> "in the event that the Court does not by its decree, adjudge, determine and declare against the State of Utah that whatever title passed to the State by said certifications of the lists selected in and to said lands as vested in the State's grantees for the use and benefit of the United States, that the certification of said land so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up, to be cancelled, and that the Court, by its decree cancel and annul the same, and by its decree cancel and annul the patent so issued by the State of Utah to the Carbon County Land Company, as hereinbefore alleged." (R. 92-93)

April 6, 1929, AMENDMENTS TO ANSWERS filed by Coal Company and Land Company. (R. 93-94)

April 6, 1929, REPLY OF STATE OF UTAH to counterclaim of United States, alleging, among other things, bar of statute, to-wit: Section 8 of Act of March 3, 1891, and alleging that the United States at all times prior to May 9, 1904, and for more than one year thereafter, had classified the lands involved as non-mineral in character, and that it never at any time until the commencement of the action entitled "United States v. Milner", on January 7, 1907, pretended or claimed that the lands were of a known mineral character. (R. 95)

June 11, 1929, JUDGMENT OF DISTRICT COURT, decreeing lands to the State of Utah. (R. 97)

January 14, 1931, DECISION OF CIRCUIT COURT OF APPEALS of Tenth Circuit on appeal, reversing decree of United States District Court (R. 611-636) (See decree January 14, 1931. R. 626; mandate R. 627.) (46 Fed. (2d) 980)

JURISDICTION.

May 18, 1931, ORDER of this Court allowing certiorari, (R. 630) pursuant to Section 240A. Judicial Code Act of Feb. 13, 1925 (U. S. C. Title 28, Sec. 347).

FEDERAL GRANTS TO STATE CONTAINED IN ENABLING ACT.

On July 16, 1894, the Congress of the United States passed what is known as the "Enabling Act", to enable the people of Utah to organize a State government, and in that Act made certain grants from the unappropriated public domain to the State of Utah for certain purposes—among others, 100,000 acres for the use of an agricultural college; 100,000 acres for the establishment and maintenance of a school of mines in connection with the University; 100,000 acres for the establishment and maintenance of a deaf and dumb asylum. (See Sections 8 and 12; other grants omitted as irrelevant.)

This Enabling Act clearly manifests the legislative intent that these lands were granted for particular purposes, and that an obligation was imposed upon the State to keep either the lands or the funds derived from the sale or lease of such lands securely for the particular purposes designated. Outside of certain sections designated as "school sections", the lands were to be selected by the State under the direction of the Secretary of Interior of the United States. (Section 13)

Lands Involved in this Suit: 5564.28 acres, situated in Carbon County, Utah, divided into five different tracts:

1. *1920 acres, School of Mines Grant*: Selected by State December 17, 1900; List No. 32 (R. 310); grant approved by Secretary of Interior June 22, 1901. (R. 561)

This selection by the State shows a large quantity of land and includes the 1920 acres described in the first paragraph of the description set forth in the decree. See agreement to purchase lands from State by Stanley B. Milner, dated August 1, 1901; purchase price, $2880, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1911. (R. 261-262)

2. *320 acres, Agricultural College Grant*: Selected by State August 22, 1901; List No. 67 (R. 277); grant approved by Secretary of Interior December 23, 1901. (R. 560)

This selection by the State shows a large quantity of land and includes the 320 acres described in the second paragraph of the description set forth in the decree. See agreement to purchase lands from State by Truth A. Milner, dated February 1, 1902; purchase price, $480, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1912. (R. 331-332)

3. *477.04 acres, Agricultural College Grant*: Selected by State April 2, 1902; List No. 71 (R. 281); grant approved by Secretary of Interior July 9, 1903. (R. 560)

This selection by the State shows a large quantity of land and includes the 477.04 acres described in the third paragraph of the description set forth in the decree. See agreement to purchase lands from State by Truth A. Milner, dated August 1, 1903; purchase price, $715.56, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1913. (R. 333-334)

4. *2244.24 acres, Agricultural College Grant;* Selected by State March 24, 1903; List No. 75 (R. 303); grant approved by Secretary of Interior May 9, 1904. (R. 560)

This selection by the State shows a large quantity of land and includes the 2244.24 acres described in the fourth paragraph of the description set forth in the decree. See agreement to purchase lands from State by Harley O. Milner, dated June 1, 1904; purchase price, $3366.36, payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1914. (R. 336)

(*This includes the 1120 acres claimed in this suit by the Independent Coal & Coke Company.*)

5. *603 acres, Deaf and Dumb Asylum Grant*: Selected by State September 15, 1903; List No. 52 (R. 268); grant approved by Secretary of Interior December 1, 1904. (R. 560)

This selection by the State shows a large quantity of land and includes the 603 acres described in the fifth paragraph of the description set forth in the decree. See agreement to purchase lands from State by Samuel H. Gilson, dated April 15, 1905; purchase price, $904.50; payable cash 25c per acre; balance in ten equal installments; last installment due January 1, 1915. (R. 339-340)

It can be seen from an examination of these contracts, whereby the State agreed to sell and Milner and his associates agreed to buy, that in not one of the contracts had full payment been made on January 7, 1907, when the suit entitled "United States v. Milner", was commenced. The last installment for the first subdivision was due January 1, 1911; second subdivision, January 1, 1912; third subdivision, January 1, 1913; *fourth subdivision, January 1, 1914,* and fifth subdivision, January 1, 1915; and yet, on January 8, 1907, (R. 263-266) it was resolved by the State Land Board as follows:

> "that final payment upon said lands shall not be accepted by this Board until the right of said applicants to demand a patent for said lands shall be determined by said court." (Referring to the court in which the case of United States v. Milner was pending.)

With the record in such a state, it is submitted that there is no basis in fact for the contention that Milner, or any of his associates, had fully paid for any of the lands, or that they, or any of them, had any equitable title to any of the tracts described. It is true that they claimed a right to purchase under their contracts, but the validity of those contracts had been brought in question in a direct proceeding to set aside those contracts, and at the time the United States, through Mr. Maynard, brought this suit the equities of the persons who were attempting to purchase (judging by the amounts paid) were indeed small.

PROCEEDINGS IN UNITED STATES V. MILNER, ET AL., RESULTING IN DECREE OF 1914.

January 7, 1907, suit instituted by the United States against Milner, et al., including Carbon County Land Company. (R. 175-195)

Note: It is not alleged that the State of Utah participated in the alleged fraud and is predicated upon the erroneous proposition that the General Land Office had no *jurisdiction* to act upon the State's applications. (R. 189)

Prayer: It seeks a judgment decreeing that none of the Milners, or their associates, ever had or acquired any right, title or interest in or to the lands; that the contracts entered into are void; that the defendants and each of them be adjudged, decreed and directed *to surrender up to the State of Utah for cancellation* any and all contracts and agreements. (R. 194-195)

January 8, 1907, (R. 263) appearance of Maynard before Land Board. (See stipulation that if the witness Candland were present he would testify that these proceedings took place as of the date mentioned. (R. 276)

September 26, 1907, second amended bill in equity. (R. 195-206) Prayer in substance the same as prayer to the original bill.

Answers were filed to this amended bill.

Testimony was taken before Master in Chancery in 1910 and submitted to the Court for decision.

June 8, 1914, the Court entered its decree.

November 15, 1915, decree affirmed by Circuit Court of Appeals of Eighth Circuit. (228 Fed. 431) (248 U. S. 594).

CASE AT BAR.

TRIAL IN DISTRICT COURT, APRIL, 1929.

On the trial in the District Court a great amount of documentary evidence was introduced, and, over the objection and exception of the defendants the testimony of Joseph A. Taff, P. S. Sowers and E. D. Dunn, witnesses who testified in 1910 in the case of United States v. Truth A. Milner, et al., was read in evidence in the instant case by agreement but subject to all objections for incompetency, irrelevancy and immateriality that might be made. (R. 103)

The State of Utah, in its objection to the testimony of these witnesses, took the position that the Government must show these lands were mineral in character, and were known to be mineral at the time and prior to the time when they were certified to the State of Utah by the United States.

The Independent Coal & Coke Company joined in the objections, and contended that upon the certification the title passed to the State, and that it is immaterial now in the proceeding, wherein the State is a party, whether the lands were known mineral lands or not,—the Statute of Limitations having run in behalf of the State many years prior to the institution of the present action. (R. 105-106)

The Carbon County Land Company joined in the objection and added the additional objection that the Government was making an effort to apply a rule for the determination of the character of the land that did not prevail at the time when the certifications were made. (R. 106) (It is believed that each and all of these objections were sound.)

Before undertaking to quote any portion of the testimony, the Independent Company desires to make clear its relation to this land and this suit as it is shown by the evidence contained in the record.

INDEPENDENT COAL & COKE COMPANY DID NOT PARTICIPATE IN ANY FRAUD BUT HAS ACTED WITH THE UTMOST GOOD FAITH TOWARD THE UNITED STATES, THE STATE AND THE CARBON COUNTY LAND COMPANY.

The Independent Coal & Coke Company is a Wyoming corporation organized under the laws of that State October 22, 1906. (R. 394 et seq.) The incorporators were W. C. Orem, C. N. Strevell, L. H. Curtis, A. J. Orem, Richard P. Morris, A. L. Pearse, James H. Patterson, Frederick A. Sweet and Foster J. Curtis. Outside of Mr. Strevell, none of the original incorporators have been stockholders since 1919. At the time of its organization this Company had a capital stock of $1,000,000, divided into 1,000,000 shares of the par value of one dollar each, and had approximately 900 acres of land situated in Sections 9, 16, 17, 19 and 30, Town-

ship 13 South, Range 10 East, in Carbon County, Utah. Since its organization its capital stock has been increased to 2,500,000 shares of the par value of one dollar each, and it has materially increased its land holding and land ownership in Carbon County, Utah, so that now it is one of the largest coal operating companies in the State. At the time of the trial of this case it had approximately 302 stockholders, residing in Louisville, Kentucky; Peoria, Illinois; Chicago, Illinois; San Francisco, California, and even in England and France. (R. 428)

In about the year 1906 Frederick A. Sweet and others associated with him, went into what is known as "Bull Hollow", situated somewhere near the present camp of Kenilworth, and opened up what is known as the Kenilworth mine. This mine did not come into active operation until about 1907. (R. 366) The camp of Kenilworth was started in the year 1907. (R. 361) It belongs exclusively to the Independent Coal & Coke Company and is located in the north half of Section 21 and the south half of Section 16, Township 13 South, Range 10 East, approximately one mile from the nearest point of the 1120 acres which the Independent Coal & Coke Company claims in this suit. The north half of Section 16, although a school section, was taken up as coal land, whereas, the south half of Section 16, upon which a part of the present camp of Kenilworth is located, was agricultural land. No coal was ever found in the south half. (R. 362) (This fact is recited to make manifest how the character of this land may be one thing in a part of a section and an entirely different thing in another part of the same section.)

The Independent Coal & Coke Company has continued to operate its mine and extend the camp of Kenilworth and improve the same from the time of its organization down to the present day.

Stanley B. Milner, deceased since 1908 at no time during his life had any connection with the Independent Coal & Coke Company, either as an organizer, officer, stockholder or otherwise, and none of his family ever owned any stock in the Independent Coal & Coke Company until the transaction of October, 1920, hereinafter explained.

The Independent Coal & Coke Company never had anything whatsoever to do with the certification of the lands here involved by the Government to the State of Utah, or with the litigation between the United States Government and the Milners between the years 1907 and 1915. Neither has the Independent Coal & Coke Company at any time been in any wise interested in the Carbon County Land Company. The Independent Coal & Coke Company does not claim any interest in any of the lands involved here except it claims to be the owner of *Section 3 and the north half of Section 10 and the northwest quarter of Section 11, Township 13 South, Range 10 East,* which is a part of the 2244.24 acres Agricultural College grant. Selected by State March 24, 1903; List No. 75 (R. 560); *grant approved by the Secretary of Interior May 9, 1904.* (R. 560).

Although this land was certified by the Government to the State May 9, 1904, and although the suit of United States v. Milner, et al., was commenced January 7, 1907, and was decided favorably to the Government June 8, 1914, and the decree affirmed by the Circuit Court of Appeals of the Eighth Circuit November 15, 1915, no proceeding was ever brought by the United States to compel a transfer of title of this land from the State to the United States. In fact, the bills of complaint filed in the suit of United States v. Milner pray that the defendants be adjudged, decreed and directed to surrender up to the State of Utah for cancellation any and all contracts and agreements that they or any of them now have with the State for any of the lands described in this bill of complaint. (R. 194, original bill; R. 215, amended bill.)

On January 8, 1907, Mr. F. E. Maynard, Special Assistant to the Attorney General of the United States and attorney for the United States in the suit entitled "United States v. Milner", appeared before the State Land Board of the State of Utah, and, among other things, said:

> "the purpose of his appearing before the Board was to officially inform Board of the fact that the Attorney General of the United States has caused to be filed a bill of complaint in the Federal Court, and I herewith hand you a copy which I serve upon you, and desire it to become a part of your files. The State of Utah has purposely not been made a party to this bill."

Mr. Maynard then read the latter part of the bill and made the following statement:

> "You will see that the only relief we ask is that you be relieved from your contract that you entered into with the Milners. That the legal title to the land is in you now and if the Government is successful will be in the State of Utah. We do not seek to deprive you of these lands, but we do seek to prevent these valuable claims from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it." (R. 263-264)

On Record Page 276 it was stipulated that if Mr. Candland (who was one of the Land Commissioners in 1907) was called as a witness he would testify that these proceedings were the minutes of the State Land Board as of the date mentioned.

Between the final determination of the case of United States v. Milner in 1915, and May 16, 1924, when this suit was started, no claim was made by the Government to any of these lands, and said lands were claimed by the State of Utah from the date when they were certified in the years 1901-04 and were charged to the State in pro tanto satisfaction of grants.

On February 10, 1920, the State of Utah, then claiming these lands which included the 1120 acres claimed by the Independent Company, entered into a transaction with the Carbon County Land Company, whereby the State, by its State Patent, conveyed all of the lands involved in this suit to the Carbon County Land Company at the purchase price of $100 per acre, or $556,428. This transaction was carried on by Governor Simon Bamberger and Attorney General Dan B. Shields, and other officers representing the State, and by Samuel A. King, Esquire, then a member of the firm of King, Braffet and Schulder, and by Mr. A. C. Milner, representing the Carbon County Land Company. (R. 574-575)

The Carbon County Land Company did not pay any money for the land, but it gave its notes for the full amount of the purchase price. These notes are dated January 2, 1920, and may be described as follows: $100,000 due January 2, 1930; $200,000 due January 2, 1940, $256,428 due January 2, 1950. (R. 384) They bear interest at the rate of five per

cent. per annum from January 2, 1925, and recite that they are secured by a mortgage of even date on the 5564.28 acres of land. The patent from the State to the Carbon County Land Company was recorded February 24, 1920, and the mortgage given by the Carbon County Land Company was recorded on the same day. (See Record Pages 384 and 592.)

The Independent Coal & Coke Company did not in any wise participate in this transaction between the Carbon County Land Company and the State of Utah.

CONTIGUITY OF THE TRACT OF 1120 ACRES TO OTHER LANDS OF THE INDEPENDENT COMPANY.

The tract of 1120 acres of land, together with the west half of Section 2 and the east half of the southeast quarter of Section 10 (land already owned by the Carbon County Land Company), making a total tract of 1520 acres, was so located and situated with reference to the other property of the Independent Coal & Coke Company that if such land were to become the subject of private ownership and be worked as a mine, it could be worked more advantageously by the Independent Coal & Coke Company than by any other concern or person, and if any other person or concern than the Independent Coal & Coke Company were to work said land and mine coal therefrom, then the coal could be secured only by means of tunnels driven through the land of the Independent Coal & Coke Company, and if such tunnels were driven from the land of the Independent Coal & Coke Company this would result in great inconvenience, disadvantage and even business embarrassment to the Independent Coal & Coke Company. Even the products derived from the land would of necessity be conveyed to Kenilworth Junction on the D. & R. G. Railroad, through Kenilwo[illegible]camp. For these reasons the Independent Coal & Coke C[illegible]any was virtually compelled to buy this land from the Carbon County Land Company as a matter of self-preservation. A mere assertion of a claim by the government would have prevented any sale.

The State claimed the transaction was a valid one; the Carbon County Land Company made a like claim. It was all a matter of public record, and the United States Government, through its officers, took no action and had taken none at any time against the State or at all since 1915; *or even before.*

EXAMINATION OF TITLE BY INDEPENDENT COAL & COKE COMPANY.

The Independent Coal & Coke Company caused its regular counsel, M. E. Wilson, Esquire, to examine the validity of this title, and on September 15, 1920 (R. 418) he gave an opinion that the title was good and marketable referring, among other matters, to the decision in Milner v. United States, 228 Fed. 431, and stated:

> "In my opinion, however, this did not in any wise affect the legal title to the lands which, by reason of the certification, was in the State of Utah. It has been definitely and unequivocably held that the certification of the lands operated to transfer the legal title to the State of Utah."

At another place in his opinion he states that he submits the opinion of the *Hon. C. W. Morse,* who was employed specially to give an independent judgment relative to this title.

Judge Morse was called as a witness on the trial. (R. 378) It appears that he was 72 years of age; that he had practiced law 40 years; that he was one of the District Judges of the Third Judicial District of Utah for 16 years, and during that time had charge of the equity division of the court; that he retired from the bench in January, 1917; that in 1920 he was employed to render an opinion in regard to the title to the land involved; that the employment was in the regular course of business, and he was paid for it. That opinion appears on Record Pages 379 to 382. Among other things he says:

> "If I am correct in the assumption that the selection by the State Land Board and the certification under such selection by the Secretary of the Interior passes the title and is the equivalent of the issuance of a patent, then I think we may safely say that the Statute of Limitations above referred to would inure to the benefit of the State of Utah or any one holding title under it to these lands." (R. 381)

Relying upon these opinions, and the fact that it was generally conceded that the transaction was a valid one, and particularly upon the fact that there had been such a great

lapse of time without any effort on the part of the Government to disturb the title of the State which Mr. Maynard had said would not be disturbed, the Independent Coal & Coke Company transferred to the Carbon County Land Company 500,000 shares of its capital stock, having a par value of $1.00 per share and an actual value of at least sixty cents per share, and took in return therefor the deed of the Carbon County Land Company to 1520 acres of land, which included the 1120 acres involved in this controversy, and assumed and agreed to pay to the State of Utah the $112,000 mortgage indebtedness which existed in favor of the State and was secured by mortgage upon said land. Let it be said that approximately 369,000 shares of this capital stock should be allocated to the 1120 acres.

On Page 436 of the record there appears the deed of the Carbon County Land Company to the Independent Coal & Coke Company, and as a part of the same transaction, the State and the Independent Coal & Coke Company entered into an agreement whereby the State Land Board agreed, for the State, to release the 1120 acres to the Independent Coal & Coke Company when said Company paid the $112,000. (R. 409) (See copy of minutes of State Board of Land Commissioners.)

Under such circumstances it is believed it is reasonable and fair to contend that the relation between the State and the Independent Coal & Coke Company became a direct one, and that the Independent Company had a direct obligation to pay the State and the State had a direct obligation to convey the 1120 acres of land to the Independent Coal & Coke Company, and that this transaction is not tainted with any fraud that had theretofore been committed by either the Milners or the Carbon County Land Company, if fraud had been committed.

TAXES AND IMPROVEMENTS.

It is shown by this record that the Independent Coal & Coke Company entered into the possession of this tract of 1120 acres; that it has been assessed for taxes by the State and its various subdivisions, commencing in the year 1920, and ever since; that the Independent Coal & Coke Company has paid taxes for the years 1920, 1921, 1922 and 1923 to the

extent of $39,949.53 (R. 104); that it has paid no taxes for the year 1924, or any year since, on acount of the pendency of this suit and an agreement made with the State officials relative to that matter. (R. 432) But the Independent Coal & Coke Company stands ready and willing to pay those taxes if the lands are held to have been taxable.

In addition to the taxes, the Independent Coal & Coke Company, between October, 1920, and May 16, 1924, the date of the commencement of this suit entered into the possession of this land, and commenced to work thereon. All of its work has been confined to the north half of Section 10. Among other things, it has constructed a tunnel extending 1100 feet into the land in controversy. This tunnel was driven through solid rock and cuts both seams of coal, which come down on a nine per cent. pitch. *To develop and produce this coal this tunnel was necessary.* It cost the Independent Coal & Coke Company $100,000, and was made in reliance upon this title. The Company did not get any coal in driving the tunnel (R. 431-432), but secured about 100,000 tons by reason of having driven the tunnel. (This shows the difficulties that were encountered by necessity in extracting coal from this land.)

A part of the land can be reached by another tunnel. This was constructed *on other land* owned by the Company than the land in controversy, and was at the time of the trial 8000 feet in. It was driven through solid rock to develop the land in controversy. That tunnel cost $260,000. *The Company would not have driven that tunnel except to reach the coal in the land in controversy.* All this work was done between October, 1920, and May 16, 1924, when this suit was commenced.

At the time of the trial, Mr. Tonkin, the then General Manager of the Company but now deceased, estimated, without accurate calculation, that the Company had taken 100,000 tons of coal from the north half of Section 10. (R. 432) On Page 434 of the record, referring to the entire tract of 1520 acres (which includes the 1120 acres), he testified:

> "We did not make an estimate of the coal content of the entire tract. For purposes of our own we did make an estimate of what we hoped it would be in mining, laying our plans out. For example, in this entry

in here that coal is thinned down now to 6½ feet. Sometimes it will go out entirely. By going out, I mean run into burning. Yes, on this particular tract of land we have indications of burning over in here on the top seam. We haven't found any pinchouts yet."

And again he says:

"I cannot tell with a reasonable certainty just what extent we will find this land burnt out until we actually go into it and work it. Nobody can. The proof of the pudding is in the eating of it, and the proof of mining is in the working. That is generally true of coal mines. I have had 40 years experience in coal operations, in Pennsylvania, British Columbia, Illinois and Utah."

And again he says:

"The western states are about the only places where we encounter it. It is quite common in Carbon County and in parts of Colorado. I wouldn't say that it makes it impossible for a man to render an opinion from mere inspection where he finds evidence of that burning and runs into it because one man's guess is as good as another's as to how far this burning goes. If you have a cropping of sufficient thickness that indicates there has been commercial coal there and you are willing to take a gamble on the extent of this burning, I would say, you could tell whether there would be commercial coal beyond it or not. You are taking a gamble. You have no absolute knowledge about it." (R. 435-436)

This testimony is quoted to show the uncertainty that of necessity inheres in the opinion of experts relative to the commercial workability of any land as coal land.

It appears from the record that no coal has been taken from any of the land in controversy except the north half of Section 10, Township 13 South, Range 10 East, and this statement applies to the entire 5564.28 acres, and, so far as the record shows, no taxes have been paid by the Carbon Coun-

ty Land Company, and *Carbon County* was therefore made a defendant in this suit by the Government to cancel tax liens. (Dismissed by C. C. A. 9 Fed. (2d) 517)

It also appears from the record that the major portion of the 500,000 shares of capital stock transferred by the Independent Company to the Carbon County Land Company has been sold by that Company (R. 430); that dividends have been paid upon that stock the same as other stock—six per cent. per annum; that this Independent Company has paid approximately six per cent. per annum ever since 1919 (R. 430); that so far as the company or its officers were concerned, they had no purpose whatever to cheat or defraud the Government; they felt they were acting honestly. (R. 430)

It is believed that a consideration of the facts above recited will make it apparent to every reasonable man that the Independent Coal & Coke Company acted with the utmost good faith; that it did not know of any fraud; that it did not believe there had been any fraud, and that it had no intention to cheat or defraud the Government, or to in any maner aid or abet such an act. Instead of benefiting by the transaction it has suffered materially, as the expenditure of $360,000 for tunnels and approximately $40,000 for taxes, will show. Outside of the workings in the north half of Section 10, and outside of the coal which the Independent Company has extracted therefrom, for which it stands ready, willing and able to account, the land involved has not been injured or even interfered with in any respect.

The Independent Company takes the position that the transaction was an honest and legal one, and if this Court shall so hold it is ready, willing and able to pay to the State whatever sum shall be found due the State for and on account of the mortgage indebtedness which it assumed, and to pay to the State and its county whatever taxes have been lawfully assessed on said land. If, on the other hand, this Court shall decide that this tract of 1120 acres belongs to the United States, then the Independent Company stands ready, willing and able to pay any amount that in the judgment of the Court it is decreed shall be paid on accounting. This attitude on the part of the Independent Company has been constant and indicates the highest degree of good faith.

TESTIMONY RELATIVE TO CHARACTER OF LAND

> "There was no exposure of commercially valuable coal on any subdivision of the lands selected." (Quotation from the opinion of the Circuit Court of Appeals, 46 Fed. (2d) 982.)

This quotation is supported by the record.

An examination of the testimony of Joseph A. Taff, taken in the case of United States v. Milner, will disclose the following facts: That he examined the lands involved for the purpose of ascertaining their character in 1906 and 1909 (R. 108); that it was a rule of the General Land Office laid down generally, prescribing the method by which the character of land should be ascertained, that unless commercially valuable coal is exposed on each legal subdivision of forty acres, then such land could not be classified as coal lands. On September 5, 1905, he wrote, among other things, as follows:

> "To this ruling the United States Land Office and the State Land Board have been and are now subject." (R. 143)

It appears that Mr. Taff was not in sympathy with this rule and claimed that it was nonsensical (R. 144), and sometime in the year 1906 he undertook to "start something" in the direction of removing such "*ridiculous*" rules in regard to the classification of coal lands. (R. 144)

He further says:

> "It must have been in the early part of 1907 that I made my classification upon these lands in question, and did not determine whether or not these lands in dispute were coal lands until that time." (R. 145)

On Page 163 of the record he makes the following statement:

> "In my opinion there are certainly subdivisions of land included in the lands in question of 320 acres that could not be operated profitably, possibly. I would designate those that lies along on the highland in the plateau, taking those individually, as the North half of Section 1, and the North half of Section 2, and the

North half of Section 3, Township 13 South, Range 10 East. The same would probably apply to the West half of Section 33, and possibly to the East half of the same Section, the North half of Sections 26 and 27, in Township 12 South of Range 11 East. These individual tracts are the least accessible, and have the deepest cover over the coal." (R. 163)

If we are to take this testimony as true, and it is the testimony upon which the Government relies, then the north half of Section 3 (a part of the 1120 acres claimed by the Independent Coal & Coke Company) is not coal land.

On Page 569 of the record Mr. J. C. Dick gave testimony on the trial of this case. His testimony shows that he was a civil engineer by profession; that he made government surveys in the year 1900, and he says:

"I think I remember the instructions I was given at that time. Those instructions emanated from the Surveyor-General's office of the United States. All surveyors have the same instructions in this intermountain country. We were instructed to report all lands as coal lands upon which coal outcropped only. I tried to carry out those instructions. That was the general practice among the persons surveying for the Government. It was returned to the Surveyor-General's office in connection with my field notes for record, and they were made and filed here in the General Land Office."

And again:

"I reported as coal lands all lands upon which a coal outcrop appeared. Where there was a quarter section of 40 acres, a subdivision upon which no coal appeared, it was not reported as coal land. In other words, unless there was an outcrop on each forty-acre tract, I didn't report that particular tract as coal land." (R. 569)

And again:

"If I didn't find any coal outcropping, I would report it as grazing land, or agricultural land, whatever it was."

On July 29, 1904, Mr. P. S. Sowers, a witness for the Government, in the case of United States v. Milner, wrote the Commissioner of the General Land Office at Washington, and, among other things, said:

> "The land is broken by small secondary canyons that do not reach to the depth of Coal Creek Canyon (and) (when the coal crops) and above the coal if it exists under the said land which as it dips would be from 1000 feet to 1500 feet at the north line, it could at this time after have no commercial value, even in considerable deposits, because of its practically being inaccessible to the market, while coal mines are now being operated on the line of the D. & R. G. Ry. thirty miles west; but if the coal is under said land in quantity it would have a value as a reserve some day when the other mines are 'dug out'. *Most of this land is fitted for cattle ranging and very good,* but is not used at present for any purpose. While the coal vein probably is under this land or *some parts of it,* yet I could *find no man who would make an affidavit to it as a fact* because of the absence of croppings or work to prove it." (R. 458) (Italics ours.)

(See testimony of Witness Dunn, read into the record from the case of United States v. Milner (R. 521):

> "I know, as a matter of fact, however, that under the rules and regulations, special or general of the Commissioner of the General Land Office and the Secretary of the Interior, that the local land office were not permitted to receive coal declaratory statements upon any of the public lands other than those upon which an exposure of coal had actually been made."

From such a record, and there is no conflict in the evidence, it seems to be beyond dispute that this land was grazing land at the time it was certified to the State by the Secretary of Interior in the years 1901-4. (Latest certificate being dated December 1, 1904, and the certificate which included the 1120 acres being dated May 9, 1904.)

It is true that in 1911 the United States Circuit Court of Appeals for the Eighth Circuit announced a different rule in United States v. Diamond Coal & Coke Company, 191 Fed. 786, and said:

"It is sufficient if the land is generally regarded by the local public as having a special value for its coal content beyond its value for agricultural or like purposes."

But, even applying the test adopted by the Court, still the character of the land in question does not satisfy that test because, as the witness Sowers said, he could "find no man who would make an affidavit to it as a fact, because of the absence of croppings or the work to prove it." (R. 458)

It is true that a different rule was announced by this Court in April, 1914, United States v. Diamond Coal & Coke Company, 233 U. S. 236, but up until 1911 the standard by which a given tract of land was to be determined as coal land or non-coal land was either outcropping or actual work, and the evidence conclusively shows not only that there was no outcropping upon any of this land, but that there had never been any actual work done upon the land until between October, 1920, and May 16, 1924, and the work then done by the Independent Company was done at the expense of driving two tunnels costing $360,000.

The evidence referred to herein is in the main the evidence of the Government. We call attention, however, to the testimony of the witness Mark Hopkins. (R. 444-445) This witness was a mining engineer and geologist 67 years of age. His operations had been in Pennsylvania, Wyoming, Colorado and Utah. At one time he had charge of the operations of the Union Pacific in Colorado, Utah and Wyoming. (R. 444) He first went into Carbon County for the purpose of studying coal lands in about 1890. (R. 444) Among other things he says:

"As to the inferences which would appear and the geological facts from which you drew the inference, you have present a strata that could contain coal. That is the outcrop, and it may go back. The outcrop in this case absolutely is somewhere within a quarter of a mile or half a mile of the land in question. Now as to how far that outcrop vein might exist is uncertain. There comes in your inference. If you infer that it does go back, then you say this is coal land. If you infer it does not go back, you say it is not coal land. Exactly so, it all depends then on inference. It is a question of

personality. While we are on that, I would like to say this—some people imagine that geology is an exact science. It is remarkably not an exact science, depending on the individual as you suggest. Something like the law, yes, you may say that. The coal formation is exposed. There are no surface conditions there that warrant as far as I know the inference that there is or is not coal because you have got a large area there of burnt outcrop where you do not see the physical conditions of the vein itself because it has been burnt up just the same as if you put a hod of coal in the stove, because it is gone." (R. 447)

Again he says:

"Now as a rule geological inference has been very costly in a merchantable way; that is, a great many people have gone on inference and have been disappointed and lost their money, by reason of not finding marketable coal." (R. 447-448)

And again:

"My opinion as to whether or not these lands involved in this case were at that time known coal mineral lands is that they were not. I would say in my opinion that a prudent coal miner would not be justified with the evidence present there at that time, that is the cliffs, the escarpment and the outcrops and other conditions you have described in pursuance of those showings there to go upon the land and spend money in the development of it, with this qualification." (R. 449)

On Page 450 he in substance says that one would not be warranted in going a half mile with "any surety" of getting what you expect to get or what you wanted to get.

If the character of this land is to be determined by the evidence, then that evidence is well nigh conclusive that none of the 5564.28 acres was known coal land in the years 1901 and 1904. In fact, even at this late day the coal can be obtained from this land only at an almost commercially impossible expense, and the certainty of it being found in commercial quantities can be established only by taking a chance and working the property. It may "pinch out" at any time.

SUBSTANCE OF DECISION OF COURT OF APPEALS.

In reversing the decision of the Trial Court, the Circuit Court of Appeals held (46 Fed. (2d) 980) (1931):

1. That the lands here involved were known mineral lands and not subject to grant by the United States.

2. That the title thereto was procured from the Government by material misrepresentations of fact.

3. That the Government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891.

4. That the six-year limitation prescribed by the statute is not a bar to this action as far as it seeks to impress a trust on the titles held by the Carbon County Land Company and the Independent Coal & Coke Company, and that the two companies hold the legal title to these lands.

5. That the decree of the Trial Court is contrary to the decision of this Court in that it granted no relief to the Government as against the Carbon County Land Company or Independent Coal & Coke Company.

6. That the decree of 1914 does not merely set aside the contract of sale between the State and the Milners but prevents the Milners and their successor, the Carbon County Land Company, and its grantee, the Independent Coal & Coke Company, from asserting any claim under certifications which the Milners fraudulently procured.

7. That the United States is not estopped by reason of the representations of the Special Assistant Attorney General of the United States, made to the State Land Board in 1907; that only the Congress of the United States could provide for the disposition of the lands of the United States.

8. That the United States was not guilty of laches because there was no reason for it to act until the State of Utah asserted its claim to these lands by issuing a patent.

9. That while the Milners were not guilty of actual fraud, and no moral turpitude is imputed to them, still in a legal sense the lands were fraudulently obtained, and that the decision involved in the original suit made in 1914 is binding upon the Court of Appeals.

10. That the title to the 1120 acres of land claimed by the Independent Coal & Coke Company is impressed with a trust in favor of the United States.

SPECIFICATIONS OF ERRORS.

This defendant assigns and specifies error as follows:

1. That the Circuit Court of Appeals erred in finding that the evidence in this case established that the 1120 acres of land claimed by the Independent Coal & Coke Company were mineral lands, and known to be such on May 9, 1904, when the grant to such lands was approved by the Secretary of Interior, and erred in giving consideration to the testimony of the witnesses Taff (R. 106-174), Sowers (R. 454-523) and Dunn (R. 523-559), and documentary evidence introduced in evidence on the former trial; and also erred in failing to apply the standard of law which existed at the time said certification was made by the United States to the State of Utah; and also erred in finding that there was a material or any misrepresentation of fact as to the character of said 1120 acres of land.

2. That the Court erred in considering the testimony and the documentary evidence introduced in the trial of United States v. Milner.

3. That the Circuit Court of Appeals erred in holding that the Government attacked the proceedings by which the certifications were procured by an action in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891,—it being conceded that the attack made by the Government was merely upon Milner and his corporation and the contracts held by him and such corporation, and not upon any title held by the State of Utah or now held by the Independent Coal & Coke Company.

4. That the Court erred in holding that the six-year limitation prescribed by the statute can be avoided by an action seeking to impress a trust upon the land involved, when, as a matter of fact and law, it cannot be avoided by an action which seeks to vacate or annul a patent or certification.

5. That the Court erred in failing to appreciate that the impressment of a constructive trust, accompanied with a reconveyance of the title to the land, is in all respects the legal equivalent of and necessarily includes the vacation and annulment of the patent, certification or other muniment of title, and in failing to appreciate that the creation of a constructive trust by the Court, as against a grantee, contains within it, as an essential prerequisite to its existence, the vacation and annulment of the grant in whatsoever form.

6. That the Court erred in failing to appreciate that the Statute of Limitations is a meritorious defense and the prime essential and basic foundation to every valid title, and that such statute was enacted for the purpose of creating a right, accompanied by its resulting repose and security, rather than for the mere purpose of barring one form of a remedy and allowing the right to be destroyed by adopting another mere form.

7. That the Court erred in holding that the United States was not estopped by reason of the representations of the Special Assistant Attorney General who was conducting the Milner suit in behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit, and thereby permitting the United States to reap an unjust advantage from the representations of its representatives.

8. That the Court erred in failing to appreciate that whatever title is now held by the Independent Coal & Coke Company to the 1120 acres of land was not involved in the suit between the United States and Milner, and that such title is predicated upon facts that have arisen subsequent to the former adjudication, and that such adjudication was made before any issue relative to such title could possibly have arisen, and in failing to appreciate that the relation between the Independent Coal & Coke Company and the State of Utah is, by reason of the agreement made between the State and the Company, a direct one.

9. That the Court erred in failing to appreciate that the title acquired by the State through the certifications was both a legal and an equitable one, and that Milner and his associates did not have any equitable title at the time of the litigation commenced in 1907 and ending in the decree of 1914, and that the position of the State was that of a purchaser for value without notice of any fraud perpetrated upon the United States.

10. That the Court erred in applying to the conduct of the Milners between the years 1901 and 1904, which was in accord with the then existing legal standards, another legal standard not created or conceived until 1914, and by this error in effect, through a retroactive application of the new standard, transformed an honest act into a fraudulent one.

SUMMARY OF ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a party. Neither is the Independent Coal & Coke Company bound or affected by such decree.

The title or interest acquired by the Independent Coal & Coke Company was not and could not have been litigated in the suit referred to.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State and had the effect of conferring ownership on the State, and this ownership inures to the benefit of the Independent Coal & Coke Company.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States in the years 1901-1904 were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character, and, second, because said land was not known to be mineral in character at any time, if ever, earlier than the year 1907. If, under the evidence, such land can be determined to be coal land, then determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made.

The Circuit Court of Appeals should not have considered evidence introduced on the former trial.

POINT IV.

THE STATE A PURCHASER FOR VALUE WITHOUT NOTICE.

The State took the grant from the United States, charged with the obligation of establishing and maintaining the agricultural college and other institutions. This obligation constituted a valuable consideration. The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct and not through the Carbon County Land Company, and therefore the State's title inures to the benefit of the Independent Coal & Coke Company as to the 1120 acres of land.

ARGUMENT.

POINT I.

RES JUDICATA.

The State is not concluded or estopped by the decree entered in favor of the United States and against Carbon County Land Company and Milner in the year 1914 in a suit to which the State was not a praty. Neither is the Independent Coal & Coke Company bound or affected by such decree.

If the decree entered in the suit of 1914 is conclusive and binding upon the State, then all proceedings had in this

suit commenced May, 1924, have been unnecessary and useless, because a constructive trust cannot be established or created against a defendant who has no title.

Even as between private parties, where the relation of vendor and purchaser exists, a judgment against the purchaser is not conclusive on his vendor.

Wood v. Davis, 7 Cranch, 271; 3 L. Ed. 339;

Cadwallader v. Harris, 76 Ill. 370;

Brandon v. Ard, 211 U. S. 11; 53 L. Ed. 68;

Kapiolani Estate v. Atcherley, 238 U. S. 119; 59 L. Ed. 1229.

In order to make the judgment available even to the grantee of the title, his convenantor must receive notice of the suit and have an opportunity to defend it. (Substance of suit in Kapioloni case.) A party in possession of land, claiming an interest as purchaser under a contract to purchase, is not in privity with his grantor in the sense that one is bound by a decree entered against the other. On the contrary, the claim of the grantee is adverse to the grantor, and the grantor is not bound by a decree against the purchaser in a case to which the grantor is not a party, rendered in a suit commenced after the contract to purchase was made.

Weed Sewing Machine Co, v. Baker, 40 Fed. 56.

It appears from the record that List No. 75, describing a large quantity of land, including the 1120 acres of land claimed by the Independent Coal & Coke Company, constitutes the selection made by the State of the land described therein. It was received and filed at the local Land Office March 24, 1903. (R. 307 and 485)

It appears that notice of publication relative to this selection was had in the newspaper known as the "Eastern Utah Advocate", of Price, Utah (R. 485); that a hearing was had in the local Land Office at Salt Lake City, to determine the character of the lands embraced in such list, June 15, 1903 (R. 485); that affirmative proof of the non-mineral character of said lands was transmitted to the Commissioner of the General Land Office. No contests, protests or suggestions as

to the mineral character of such land had been filed in the local Land Office (R. 485); that there was no other proof relative to the character of the land except the non-mineral affidavit attached to the list and proof of publication. This hearing was ex parte. It appears, however, to have been open and public, and there was no oral testimony taken before the Register and Receiver as to the character of the land. (R. 487)

The certification of this land, including the 1120 acres claimed by the Independent Company, was approved by the Secretary of Interior May 9, 1904. (R. 560) Of course, the title of the State in the lands selected by it, when finally approved, related back to the date of selection, March 24, 1903.

Harley O. Milner did not contract to purchase from the State until June 1, 1904. (R. 336)

There is no evidence in the record that Harley O. Milner made any representations, either by way of affidavit or otherwise as to the character of this land. He was not a party to the second amended bill of complaint filed by the United States in the suit entitled "United States v. Milner". (R. 195) He appears to have been named in the title of the original bill, but the prayer for process contained in said bill does not seek a subpœna against him. It is not shown that he ever appeared in the action entitled "United States v. Milner".

It is true that there are allegations contained in these pleadings, but it is submitted that the record does not show that the officers of the United States acted upon any representations made either in affidavits or otherwise by Harley O. Milner. In fact, the record shows that the representations were made by Heber M. Wells and Byron Groo, authorized agents of the State Land Board of the State of Utah. (See affidavit, R. 306)

However this may be, if Harley O. Milner was guilty of fraud in obtaining this contract, he did not acquire any equitable title or equitable right. The effect of the decree of 1914, as against him as a purchaser or as against any alleged assignee, was not to transfer any title from Harley O. Milner, or from his assignee, to the United States, but was merely to preclude said Milner, or his assignee, from thereafter asserting as against the United States any claim under the contract of purchase.

NATURE AND EFFECT OF CERTIFICATION.

This certification conveyed every conceivable interest that the Government had in the lands. It was not a void conveyance, as is claimed in the original and amended bills of complaint in the suit of United States v. Milner. (R. 188 and 209) Even conceding for the purpose of argument, and for that purpose only, that these lands were obtained from the United States by actual fraud, the grant would not have been void but merely voidable. The allegations contained in the pleadings in the original suit, to be found on pages of the record just referred to, are to the effect that the Land Department was without jurisdiction to certify these lands. It is submitted that such an allegation is entirely destitute of foundation, either in law or in fact.

It will be noticed from an examination of those pleadings that the United States relied upon Section 2449 of the Revised Statutes of the United States or the Act of August 3, 1854. This section reads:

> "Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby, but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

U. S. C. A., Title 43, Section 859.

It is settled law that a certified list issued under and pursuant to this section of the statute is of the same effect as a patent. In fact, it is a patent. The provision that where

lands embraced in certified lists are not of the character contemplated by the Act under which the selections were made by the State the lists shall be null and void, can be made operative only by courts called in due course to consider the titles thus created. Whether the lands are mineral or non-mineral in character when such lands are a part of the public domain, is a fact to be determined by the Land Department under the supervision of the Secretary of Interior before he approves or disapproves of the certification of the selected list.

The approved certification is an adjudication of the Land Department and is conclusive as against and impervious to collateral attack. It vests a perfect title in the grantee. It is like the judgment of any other special tribunal vested with quasi-judicial power. Such a judgment cannot be void, and, if voidable, can be vacated or annuled only by means of a bill in chancery filed in a court of competent jurisdiction.

Buena Vista Petroleum Co. v. Tulare Oil Co., 67 Fed. 226;
Moore v. Robbins, 96 U. S. 530;
Southern Development Co. v. Endersen, 200 Fed. 272-277;
United States v. Beaman, 242 Fed. 876;
Noble v. Union River Log Co., 147 U. S. 165;
Burke v. Southern Pac. R. R. Co., 234 U. S. 668;
United States v. Winona R. R. Co., 67 Fed. 948.

"The certificates were evidence that the officers of the Land Department had adjudged that the grants to the Winona Railroad Company had attached to the lands in controversy, and their legal effect was the same as though patents to the State had been issued for the benefit of that Company."

And again:

"A certificate or patent is the record evidence of the judgment of this tribunal, and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department it is like the judgment of other special tribunals, vested with judicial powers impervious to collateral attack."

If the Land Department did not have jurisdiction to determine the mineral or non-mineral character of this land, then it is pertinent to inquire in what tribunal was such jurisdiction vested?

Section 13 of the Enabling Act provides that the selection shall be made under the direction of the Secretary of Interior.

It will be noticed that the complaints, both amended and original, in the action entitled "United States v. Milner", do not seek to have the contracts of the Milners surrendered to the United States, but they do seek to have such contracts "surrendered up to the State of Utah for cancellation" (R. 215), but the decree had that effect without any physical surrender.

ISSUE INVOLVED IN MILNER SUIT.

It appears that on June 1, 1904, the State agreed to sell, and Harley O. Milner agreed to buy, 2244.24 acres of land for the purchase price of $3366.36. (R. 336-337) (This included the 1120 acres claimed by Independent Company.) There was a payment of 25c per acre and the balance of the principal was to be paid in ten equal installations of $280.53 each on January first of each year, commencing in the year 1905 and ending 1914. At the time this Milner suit was commenced (January 7, 1907) he had paid just three payments, and there was a balance due on the principal of $1963.70.

On January 8th, 1907 the State Land Board passed a resolution whereby the rights of Milner in the contract were to remain in "statu quo" during the pendency of the Milner action. (R. 266)

Without continuing this statement it is quite apparent that the title of the State to the land described in the Milner contracts was not involved, and no issue of fact or law could possibly have arisen in the Milner suit relative to the validity of the title of the State to any of this land. By the Milner suit the United States sought merely to annul the Milner contracts.

Third National Bank v. Stone, 174 U. S. 434; 43 L. Ed. 1035;
Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 441;
Gajan v. Patout, 135 La. 156; 65 So. 16.

These cases are illustrative of the application of the well recognized principle that a judgment is not a bar to litigation of any demand or cause of action which from the nature of the case could not have been adjudicated in the former suit.

Quoting from the Louisiana case:

> "Again where two persons litigate titles set up by them, respectively, to particular property, and it is decreed to belong to one of them, though in fact it belongs to a third person not a party to the suit, such third person may thereafter, either sue for the property himself, or may transfer his right to the party cast in the litigation or to another, who may then exercise it, and renew the litigation for the vindication of the title thus acquired. In other words, a litigation is not conclusive as against those who are not parties to it, nor as to rights not possessed by the litigants at the time, save as to persons who are the privies of each other."

IMMUNITY OF STATE.

The State could not have been compelled to appear in the action. It was immune from suit by the United States except in the United States Supreme Court. The record in the Milner suit cannot be evidence against the State in this action.

Tindal v. Wesley, 167 U. S. 204.

Quotation from the opinion of Mr. Justice Harlan:

> "The State not being a party to the suit, the judgment will not conclude it."

It is not believed that there are any peculiar circumstances in this case that justify the holding of the Circuit Court of Appeals that the State is bound in equity by the decree of 1914. To say that because Mr. Maynard, the Special Assistant Attorney General, appeared before the State Land Board and served a copy of the complaint of the United States in the Milner action, and read portions of the opinion of Williams v. United States, 138 U. S. 514, that the State was compelled either to intervene in the suit while it was pending, or voluntarily convey the land after decree was entered in the

suit, is to controvert the entire purpose of the appearance of Mr. Maynard before the Land Board, and in effect destroys the immunity which enshrouds the State as a sovereign. It also requires the State to disbelieve the assurance given by Mr. Maynard and to ignore the prayer of the complaint which sought the surrender of the Milner contracts to the State.

It is submitted that the State is not bound by the decree of 1914; that the title now claimed by the Independent Coal & Coke Company was not involved in that suit and could not have been litigated therein, and if the State is not bound, then the Independent Coal & Coke Company is not affected by that decree or any provision thereof.

POINT II.

STATUTE OF LIMITATIONS.

Section 8 of the Act of March 3, 1891, providing that suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent, bars the right of the United States as against the State and had the effect of conferring ownership on the State, and this ownership inures to the benefit of the Independent Coal & Coke Company.

The State relies squarely upon the provisions of Section 8, Act of March 3, 1891, and contends that this Act had the effect of making its title impervious as against attack by the United States; that is, no inquiry can be had relative to the validity of the title of the State to the land involved unless a suit involving such an inquiry was instituted within six years after these certifications were approved by the Secretary of Interior. As to the 1120 acres, such suit must have been instituted against the State within six years from May 9, 1904.

The Independent Coal & Coke Company contends that the position of the State is sound in this regard, and, if sound, it inures to the benefit of the Independent Company, and consequently the title of the Independent Company to the 1120 acres is not open to attack by the United States.

In the first place, it must be understood that the Statute of Limitations is unlike the defense of bona fide purchaser in this: that in some instances the latter defense merely sus-

pends the right of a plaintiff to assert his equity as against an innocent purchaser for value without notice, whereas the Statute of Limitations prevents the inquiry or investigation as to whether such an equity exists. It cuts off the right to attack without regard to equity.

In form the Statute of Limitations cuts off a remedy, but in substance it preserves and protects seisin, "because the person seised is owner till someone else proves a better right to seisin." (3 Holdsworth's History English Law, 93). The purpose of such statutes is to give stability to land titles, and to make their owners secure as against litigation or adverse claims arising from any source, without regard to equity.

Whether this action is treated as an original suit or as an ancillary one, that is, one in aid of a former decree, is, it is submitted, immaterial, so far as the application of the Statute of Limitations is concerned, because this action brings into litigation a different title than that which was involved in the suit of United States v. Milner. It is well established law that a creditor or claimant can reach, generally with the aid of equity, any property which the debtor might reach with said aid, but the ancillary action against the new party to reach such property must be brought within the period prescribed by applicable statutes of limitation.

Davey v. Dodge, 213 Fed. 722 (8th C. C. A.)

This action brought into litigation a title and, when the state came in, a party, that were not and could not have been involved in the former suit. The State did not hold that title in trust for the Milners during the pendency of the former litigation. The State never parted with any portion of that title, or *any equity in it, if the Milner contracts were procured by fraud.* The decree in the Milner suit did not and could not go further than to adjudicate that the Milners had no right, and the Independent Coal & Coke Company does not claim anything by virtue of the contracts which were adjudicated to be null and void by the decree of 1914. When that decree was entered and affirmed, the legal and equitable title to the land involved was vested in the State of Utah, and it is submitted that to vacate or annul that title the United States must have instituted its suit within the period prescribed by Section 8 of the Act of March 3, 1891.

It is true that the title passed from the United States to the State by means of what is called certifications, but it is submitted that these certifications are patents within the meaning of the section relied upon. That section reads:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patent. (Sec. 8, Act of March 3, 1891.)

Notice the words "any patent". A patent is only another name for a land grant. Bouvier, in his law dictionary, defines the word "patent" as follows:

> "A grant of some privilege, property or authority made by the government or sovereign of a country to one or more individuals."

And again he says:

> "In the United States the word "patent" is sometimes understood to mean the title deed by which a government, either state or federal, conveys its lands."

2 Bouvier 2514.

In early times the custom grew up of granting exclusive privileges by means of letters patent, and finally the word "patent" was applied to any land grant made by a sovereign. We know that ever since July 4, 1836, and particularly since June 19, 1878, the President of the United States has not signed even those instruments that are called formal patents, but by express legislation these are signed by a secretary appointed by him for the purpose.

Title 43. Sections 8-9, U. S. C. A.

The practice has been for the State of Utah, ever since statehood, to make selections called lists (See List No. 75, R. 560), and then these lists, if found proper, are finally approved by the Secretary of Interior. (R. 560). This was not an unusual or exceptional practice, but the titles to thousands of acres of land find their validity in such a practice. No formal patent is issued, but the proceeding just described has the effect of a grant from the United States to the State,

and after obtaining such grant, the State either retains the land or sells or leases it, as its Land Board may decide. Surely no distinction can be made between what is called a certification, which is a land grant by the sovereign, and some instrument which purports to be signed by the President, but which is in fact signed by some secretary inferior in rank to the Secretary of Interior, when such instruments serve identically the same function.

United States v. Winona, 165 U. S. 463 (1897)

In that case it was claimed that the *certifications* were procured by fraud, but this court applied a section which is a mere complement to the Act of 1891 to the certification and held that the title of the purchaser had been confirmed. To do this, this court had to hold that the words "patent" and "certification" were synonymous, and the land department of the government has given a like construction to those words. The fact that neither the Executive Department of the National Government issued nor the Executive Department of the State Government required any formal patent is a practical interpretation of many years standing that the two words are used synonymously, and that a formal patent was not necessary.

CONSTRUCTIVE TRUST THEORY.

But it is claimed by the plaintiff, and held by the Circuit Court of Appeals, that the application of the section relied upon may be avoided because such section is no obstacle to a suit to impress a trust on the title to the land certified. This holding, if sound, is extensive in its consequences, because it virtually repeals Section 8 of the Act of March 3, 1891, and defeats the avowed purpose of this statute.

United States of America v. Amalgamated Sugar Company, 48 Fed. (2d) 156 (10th C. C. A.) March 5, 1931.

This case was argued in the Circuit Court of Appeals of the Tenth Circuit on the same day with the case at bar. It is cited herein for the purpose of showing the effect of sustaining the contention of the Government. In his special concurring opinion, Circuit Judge McDermott says:

> "The avowed purpose of this statute, as disclosed by its legislative history, was to give stability to land titles and to encourage settlement of public lands."

And again, after quoting from the opinion of this court in United States v. Chandler-Dunbar Company, 209 U. S. 447, he says:

> "This reasoning seems to me to be sound. I have difficulty in reconciling myself to the proposition that if, by reason of the statute, the government may not bring suit to annul its patent, it may nevertheless recover the land by impressing a trust on the title."

And again:

> "While the result seems to be to enable the government to escape the statutory bar in all cases except where a bona fide purchaser is involved, and to disturb the repose sought by the statute, I feel that the two Supreme Court cases cited are determinative and therefore concur."

He refers to the case of Lockhart v. Leeds, 195 U. S. 427, and United States v. New Orleans Pac. Ry. Co., 248 U. S. 507. It is submitted that Lockhart v. Leeds does not support, in any respect, the proposition contended for by the Government. With reference to the case of United States v. New Orleans Pac. Ry. Co., it is submitted that such case is not in point, because the United States was not suing to recover land which it owned or claimed to own, but it was suing to protect the rights of third parties, namely, homestead claimants, who had become involved in litigation with the railroad company, and where the United States brings a suit to protect the rights of third parties or bring a suit to declare a forfeiture because of a breach of conditions subsequent, the statute, of course, could not apply. Such suits are illustrated by the following cases:

United States v. Kern River Company, 264 Fed. 412 (9th C. C. A.) 1920.

In this case District Judge Rudkin, in speaking for the Circuit Court, uses language that is inconsistent with the contention that there is no distinction between certification and patent, but that case, while affirmed in this court, was not affirmed for the reasons given by Judge Rudkin.

Kern River Company v. United States, 257 U. S. 147, 66 L. Ed. 175.

An examination of the opinion of Mr. Justice Van Devanter reveals the following language:

> "But, in so far as this suit seeks to enforce a forfeiture for a breach of a condition subsequent, it plainly is not a suit to vacate or annul a patent, and so is not within the statute."

Cramer v. United States, 261 U. S. 219.

In this case suit was brought by the United States acting in behalf of three Indians, and it was claimed that the suit was barred by the identical statute under consideration. Mr. Justice Sutherland said:

> "The object of that statute is to extinguish any right the Government may have in the land which is the subject of the patent—not to foreclose claims of third parties."

La Roque v. United States, 239 U. S. 62.

In this case it was urged that this statute barred the action, but this court held that it had been determined that this section referred to patents issued for public lands of the United States, saying:

> "This trust patent was not issued for public lands of the United States but for reserved Indian lands, to which the public land laws had no application."

In fact, there is nor was no necessity for the application of this statute to any of the cases just cited, because laches is a defense to such actions.

United States v. Des Moines Navigation Company, 142 U. S. 510, 35 L. Ed. 1099.

In this case it was held that where the United States is only a nominal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the Government is involved, the defense of laches and limita-

tions, where the delay has been for thirty years, and circumstances have changed, will be sustained. Among other things, Mr. Justice Brewer said:

> "Before, however, examining the applicability of this proposition of law to the case at hand, one or two preliminary thoughts naturally arrest the attention. There has been long delay in presenting this claim. A third of a century has passed since the State conveyed to the Navigation Company, and more than a quarter of a century since Congress relinquished and granted to the State the title to these lands. During that time there have been marvelous changes in the population, the industries, the business interests of the State; legislatures and courts have been busy determining rights and establishing relations based upon the vesting of title in the Navigation Company. A proposition to destroy this title, and to put at naught all that has been accomplished in respect thereto and based thereon during these years, is one which may well make us pause. While it is undoubtedly true that when the government is the real party in interest, and is proceeding simply to assert its own rights and recover its own property, there can be no defense on the ground of laches or limitation," (citing authorities); "yet it has also been decided that where the United States is only a formal party, and the suit is brought in its name to enforce the rights of individuals, and no interest of the government is involved, the defense of laches and limitation will be sustained as though the government was out of the case, and the litigation was carried on in name, as in fact, for the benefit of private parties."

And again he says:

> "Even if this be regarded as a bill brought by the United States simply to protect its own interests, and recover its own property, still it is well settled that where relief can be granted only by setting aside a grant, a patent, or other evidence of title, issued by the government in the orderly administration of the affairs of the Land Department, the evidence in support must be clear, strong, and satisfactory.

> Muniments of title issued by the government are not to be lightly destroyed."

It is true that a grantor who has been defrauded of his land may bring a suit in equity, the purpose of which is to obtain a formal cancellation or annulment of the grant, or he may elect to bring a suit in equity to have the fraudulent grantee declared a constructive trustee. But it is submitted that the decree declaring a constructive trust is nothing more or less than a cancellation or annihilation of the grant. No such trust can be declared without vacating and annulling both the form and the substance of the grant. If the latter is affirmed, it stands (213 Fed. 722) and is an immovable obstacle to the impressing of a trust. If the trust is declared, the grant is annihilated. This statute should not be sacrificed to any such a fiction as a constructive trust. Such a trust is a mere assumption—not a fact; indulged in not as an end but to work out another purpose—in this case, to bring about a vacation of the grant. This statute creates a rule of property, and the decisions of this court have so held.

United States v. Winona, 165 U. S. 463, (supra)

In that case it was claimed that the certifications were procured by fraud, but this Court applied a section of this identical legislation to the certification and held that the title of the purchaser had been confirmed, treating the words "patent" and "certification" as synonymous.

United States v. Chandler-Dunbar Co., 209 U. S. 447-450.

In this case the United States filed a bill to remove a cloud from its title to certain lands. The defendant relied upon this statute. The United States replied that the action was not one to vacate and annul a patent but to quiet title. This contention of the Government was not sustained, the Court using the following language:

> "In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell

v. Warren, 2 Black 599, 605; Sharon v. Tucker, 144 U. S. 533; Davis v. Mills, 194 U. S. 451, 457. This statute must be taken to mean that the patent is to be held good and is to have the same effect against the United States that it would have had if it had been valid in the first place. See United States v. Winona & St. Peter R. R. Co., 165 U. S. 463, 476."

Robinson v. Hook, 4 Mason 132; 20 Fed. Cas. 1017, decided by the Circuit Court for the District of Maine in 1826, Circuit Justice Story rendering the opinion. He said:

> "But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted, that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of money received to use, or of factorage concerns, or of general account, into whose service the doctrine might not be pressed. The doctrine appears to me well established, that in cases, like the present, of merely constructive trusts, where there are concurrent remedies at law and in equity, the statute of limitations is a good bar, and may be pleaded to a suit in equity as well as at law."

He cites Elmendorf v. Taylor, 10 Wheat. 152, decided by Chief Justice Marshall in 1825. Quotation from syllabus:

> "Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has been held by analogy to bar relief in equity, even where the period of limitation for a writ of right, or other real action, had not expired."

In his opinion Chief Justice Marshall said:

> "This is not an express trust. The defendants are not, to use the language of the Lord Chancellor in the case last cited, 'strict trustees, whose duty it is to take care of the interest of cestuis que trust, and who

> are not permitted to do anything adverse to it.' They hold under a title in all respects adversary to that of the plaintiff, and their possession is an adversary possession. In all cases where such a possession has continued for twenty years, it constitutes, in the opinion of this court, a complete bar in equity. An ejectment would be barred, did the plaintiff possess a legal title."

To avoid the Statute of Limitations, because of a trust, the latter must be of a technical and continuing character, which falls properly and peculiarly within the exclusive jurisdiction of a court of equity.

> Kane v. Bloodgood, 7 Johnson's Chancery, 90; 11 Am. Dec. 411.

This decision was rendered by Chief Justice Kent in 1823. The courts throughout this country have always regarded it with great respect because it is an exhaustive discussion of the authorities and principles relating to the application of statutes of limitation to cases where a trust is involved. From it, one is compelled to deduce the principle that the statute barring a concurrent remedy cannot be avoided by merely seeking to establish a constructive trust.

> New v. Smith, 86 Kan. 1; 119 Pac. 380.

The Court said:

> "Looking beyond mere form of the action to the real issue therein we hold that the action is an action for relief on the ground of fraud, and that the two-year limitation applies."

> Landis v. Saxton, 105 Mo. 486; 24 Am. St. 403.

This case recognizes the principle that if the remedy of a constructive trust is merely concurrent with some other remedy, that is barred, then the statute applies with the same force to constructive trusts as it does to the concurrent remedy.

From these authorities, and the others cited in the petition, it is apparent that the decision of the Court below is in conflict with the prior decisions of this Court, which recognize the statute as creating a meritorious right, and also

with the general law of the land as it has been established by the leading cases announced by the Courts.

From the opinion in the Amalgamated case, the conclusion is inevitable that at least one member of the Circuit Court of Appeals of the Tenth Circuit had grave doubts or misgivings as to the validity of the contention made by the Government, and that he relied upon the New Orleans case, supra, which is clearly distinguishable from the case at bar.

If the rule announced in this case, and in the Amalagamated case, is sound law, then one may own and possess a tract of land for fifty or even a hundred years, and if mineral or coal is discovered upon that land at any time, however remote from the grant, then, if some expert geologist can truthfully testify that the fact of the presence of this mineral or coal ought to have been known prior to the federal grant, then the title of the private owner fails. It is submitted that this is sacrificing substance and reality to form and fiction.

POINT III.

CERTIFICATIONS NOT FRAUDULENT.

The certifications obtained by the State from the United States in the years 1901-1904 were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the land involved was non-mineral in character, and, second, because said land was not known to be mineral in character at any time, if ever, earlier than the year 1907. If, under the evidence, such land can be determined to be coal land, then determination can be arrived at only by making a retroactive application of a standard adopted approximately ten years after the certifications were made.

In the first place, it is submitted that neither the Circuit Court of Appeals nor the Trial Court should give any consideration to the evidence that was read into this record from the transcript of the testimony in the case of United States v. Milner. The record in that case cannot be evidence against the State in this case " for any purpose touching the merits of its claim." (Language of Mr. Justice Harlan in Tindal v. Wesley, supra.)

The interest in the 1120 acres which was litigated and determined in the case of United States v. Milner, was the interest which Harley O. Milner attempted to acquire by his contract of June 1, 1904. (R. 336) The decree of 1914 could have no other or further effect than annuling that interest. That interest is an entirely different interest than that claimed by the Independent Coal & Coke Company in this case.

In the latter part of 1919 and the early part of January, 1920, the Carbon County Land Company entered into a new contract with the State of Utah and agreed to buy the entire 5564.28 acres for the purchase price of $100 per acre, and, pursuant to that contract, the State made its State patent to the Carbon County Land Company, February 10, 1920. Thereafter, in October, 1920, this Independent Company entered into an agreement with the Carbon County Land Company as to the 1120 acres, and also entered into an agreement with the State so that the relation between the State and the Independent Coal & Coke Company was original rather than derivative. The State's interest in the 1120 acres of land under this arrangement passes directly from the State to the Independent Company, and the Independent Company's obligation to pay the State for that interest is direct, and the Carbon County Land Company is eliminated from the transaction so far as the State and the Independent Company are concerned.

As has been pointed out, no evidence appears in this record that Harley O. Milner ever committed any fraud or made any fraudulent representations; neither did the Carbon County Land Company. While there is no evidence of it, it appears to have been claimed by the Government that the Carbon County Land Company was the assignee of Harley O. Milner. Be that as it may, the fraud that is claimed in the former suit was committed by Stanley B. Milner, according to the allegations of the United States as they are set forth in the original and amended bills of complaint.

Stanley B. Milner died on the second day of May, 1908 (R. 213), six years before the decree in the former suit. The non-mineral affidavit upon which the General Land Office and the Secretary of Interior relied in issuing and approving the certificate made May 9, 1904, was that of Governor Heber M. Wells and Byron Groo, agents of the State Land Board.

(R. 303). These officials of the State seemingly exercised their honest judgment with reference to the character of this land. Although the matter was public and was pending from March, 1903, until May, 1904, no protests were made, and it is difficult for anyone to find any fraud perpetrated by Harley O. Milner, or by any one representing him.

Construing the record most favorably to the United States, and for the purpose of argument and for that purpose only, assuming that Harley O. Milner did commit a fraud, and by means of that fraud obtained the contract of June 1, 1904, still the effect of that fraud was nullified by the decree of 1914, and neither Harley O. Milner nor any one representing him or in privity of estate with him, got any benefit whatsoever from the alleged fraud. Evidence of that fraud, if evidence there is, is entirely immaterial to the issue as to the title involved in the case at bar.

The Independent Company's interest comes from the State. That interest has never been litigated and could not have been litigated in the former Milner suit, and consequently the finding that Certificate No. 75 was fraudulent is not supported by any evidence. Neither is there is any sufficient evidence to support the finding that these lands were mineral in character.

As was said by Mr. Justice Brewer in United States v. Des Moines, 142 U. S. 510, supra:

> "Muniments of title issued by the Government are not to be lightly destroyed."

It appears from the evidence, and is conceded in the opinion of the Court below, that there was no exposure of any commercially valuable coal on any subdivision of the lands selected; that at the time of the selection there was a rule of the General Land Office at Washington to the effect that without such exposure the lands could not be listed as mineral. To this rule both the United States Land Office and the State Land Board were subject (R. 143), and, pursuant to that rule, these lands were certified to the State May 9, 1904.

Sometime in the year 1906 Mr. Taff, who was not in sympathy with this rule and claimed that it was "nonsensi-

cal" (R. 144), undertook to "start something" in the direction of having the rule changed. He regarded the rule as "ridiculous" (R. 144), and it was not until the early part of 1907 that he classified the lands involved as mineral or coal lands. (R. 145) In other words, the suit of United States v. Milner was commenced January 7, 1907, and even at the time of its commencement the lands involved in that suit had not yet been classified as coal lands.

As late as July 29, 1904, Mr. P. S. Sowers stated:

> "While the coal vein is probably under this land, or some parts of it, yet I could find no man who would make an affidavit to it as a fact because of the absence of croppings or work to prove it." (R. 358)

From such evidence it was reasonable for the Court below to conclude that Milner and his associates, in making their application to obtain this land for grazing purposes, had no moral turpitude, i. e. that they were acting honestly in obtaining these lands by the only method that was at that time open to them under the law.

With reference to the rule requiring an outcropping of coal as a prerequisite to a classification of the land as coal land, it is believed that instead of that rule being "nonsensical" or "ridiculous", as designated by the witness Mr. Taff, it was, on the contrary, the most reasonable and efficacious rule, in view of the nature of the land as it exists in Carbon County, Utah. Veins of coal found in the north half of Section 10 were reached only by an expenditure of approximately $360,000, and it remains for the future to demonstrate whether that expenditure can be justified commercially. Part of these coal veins have in the remote past been burnt out.

As Mr. Sowers said in writing in 1904, in substance, that some of the coal was 1000 or 1500 feet beneath the surface and it had no commercial value "even in considerable deposits", because of its practically being inaccessible to the market. (R. 458) The outcropping rule has been applied for years to metalliferous deposits. It has the virtue of certainty about it, whereas, the rule of geological inference, so-called, generally results in uncertainty. The doctrine of extra-lateral right as to veins of ore finds its origin here.

No change was made in the rule whereby the character of the land was determined by outcroppings until 1911, when the Circuit Court of Appeals of the Eighth Circuit, in the Diamond Coal & Coke Company case, appears to have declared a different rule. This case was not affirmed in this court until April, 1914. Apparently the decision of Judge Marshall of the District of Utah, in United States v. Milner, awaited the decision of this Court in the Diamond Coal & Coke Company case, and in June, 1914, the decree was entered in the Milner suit.

It is true that decree adjudicates that in a *legal sense* Milner was guilty of a fraud in obtaining the contracts to purchase the land, but certainly that adjudication does not adjudicate the title of the State to the land in question, because that title was not and could not have been an issue in the Milner suit.

A retroactive application of the new rule had the effect of making that which was honest at the time of its commission, fraudulent ten years after its commission.

In Clancey v. Barker, 131 Fed. 161, Eighth Circuit, 1904, Circuit Judge Sanborn said:

> "A retroactive decision which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto law."

In the case of United States v. Maxwell, 121 U. S. 325; 30 L. Ed. 949, Mr. Justice Miller used the following language:

> "In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of

> the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistence to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This language is peculiarly applicable to that witness Mr. Taff, who designated the outcropping rule as "ridiculous" and "nonsensical", and who undertook to "start something" to have that rule changed.

It is a fundamental rule of law that if a representation is true when made and when acted upon, it cannot constitute actionable fraud, because a subsequent change in conditions makes the representation false. A fraudulent representation respecting property, either bought or sold, means in law a statement of a material fact, false when made, and known to be false. It must be shown that the party to whom it was made relied upon it and believed it to be true. No other rule than this could be tolerated in the law.

The only representation made here, so far as the 1120 acres are concerned, appears to have been made by the officers of the State, who acted honestly. The representation that these lands were grazing lands and non-mineral in character was true at the time it was made. There was no change in the rule for the determination of the character of the land for many years after such representations were made. It is submitted that the making of a retroactive application of the new rule announced ten years after the certification of the land is contrary to the fundamental principle generally conceded by men that the character of an act is to be determined by the standards in force at the time of its commission.

A paraphrase of the language of Mr. Justice Brewer is United States v. Winona, supra, is not out of place. Conceding that the rule was erroneous, yet it was one made by the officers of the Department, charged with the duty of administering the grant and determining what lands did and what did not pass—the only tribunal to which the applicant for the land could then apply and upon whose rulings he was bound to act.

For these reasons it is submitted that the certifications of the land involved were not tainted with fraud, committed either by Stanley B. Milner, Harley O. Milner or the officers of the State or any other person.

POINT IV.

THE STATE A PURCHASER FOR VALUE WITHOUT NOTICE

The State took the grant from the United States, charged with the obligation of establishing and maintaining the Agricultural College and other institutions. This obligation constituted a valuable consideration The State acted innocently and is a purchaser for value without notice. The relation of the Independent Coal & Coke Company to the State is direct and not through the Carbon County Land Company, and therefore the State's title inures to the benefit of the Independent Coal & Coke Company as to the 1120 acres of land.

In the opinion of Mr. Justice Stone, 274 U. S. 640, when this case was before this Court on the sufficiency of the complaint, it was in substance said that the Carbon County Land Company could not acquire the lands even through a new and independent contract without a surrender of such rights as it had under the earlier contracts. It seems to have been assumed that the Carbon County Land Company was a party to a fraudulent scheme or conspiracy to acquire title to the lands involved. It does not appear by any evidence in the record that Harley O. Milner, who had the contract for the 1120 acres, made or caused to be made, any representations, true or false, with reference to the character of that land. There is no evidence that he was attempting to acquire the land for the Carbon County Land Company. The only proof submitted to the Land Department upon which the certification was made, was the non-mineral affidavit attached to List No. 75, made by Heber M. Wells and Byron Groo, (R. 485) and it appears that they acted honestly, on the information that they then had. In the opinion of Mr. Justice Stone, it is said that bona fide purchaser is an affirmative defense, and in view of the fact that the former hearing related only to the sufficiency of the original complaint in this action, it is difficult to see how the question of bona fide purchaser could have been involved on that hearing. The Carbon County Land Company, at the most, had only the small interest of the cash payment and of the payment of three installments made by Harley O. Milner, at the time of the institution of the Milner suit in January, 1907, that is, if the Carbon County Land

Company had any such interest at all. As has been pointed out, it does not seem that Harley O. Milner was before the Court in that action at all. Assuming that he was, or assuming that he had assigned to the Carbon County Land Company, the decree effectively cancelled and annulled that interest, and a physical surrender, it is submitted, was unnecessary, especially in view of the assurances made by Mr. Maynard, and in view of the specific prayers of the complaints that such interests be surrendered up to the State, instead of the United States, for cancellation. Mr. Justice Stone qualified the statement of the Court by the phrase "unless the State stood in the position of a purchaser for value without notice".

Now, it is true that the rules relative to valuable consideration and to innocent purchasers paying such consideration, do not and cannot apply as between the United States and the State, in any ordinary sense. The United States became the owner of this land by its treaty with Mexico. History tells us that the approximate sum of $20,000,000.00 was paid to Mexico by the United States, but the assertion that this was paid for the vast area of territory acquired is rather difficult to believe. The State became the owner, if at all, by the grant contained in the Enabling Act, followed by the certifications. Of course, the new state paid no money for the land. This grant was made for a specific purpose, from which a general public benefit will result and has resulted to both the State and the nation. List No. 75 was certified with the purpose of establishing and maintaining the Agricultural College. When the State took such grant, it took it charged with the obligation of applying the land contained therein to the purpose specified in the grant. If the State received that grant, as it did, without any notice of the fact that the lands were known coal lands, then it is submitted that the State would be an innocent purchaser for value without notice.

In the case of Stanley v. Schwalby, 162 U. S. 253, it appears that the City of San Antonio, Texas, had conveyed a tract of land to the United States for the establishment of military headquarters there. Mr. Justice Gray, speaking for a unanimous court, said:

> "A valuable consideration may be other than actual payment of money, and may consist of acts to be

done after the conveyance." (Citing authorities) "The advantage inuring to the City of San Antonio from the establishment of the military headquarters there was clearly a valuable consideration for the deed of the City to the United States."

It is believed that on the authority of the Stanley case, the State of Utah is a purchaser for value without notice. It should be remembered that the entire acreage involved in this suit has been charged and is still charged by the United States as against the State as a pro tanto satisfaction of the grants contained in the Enabling Act.

CONCLUSION.

It requires no particular mental effort to determine that the Independent Coal & Coke Company transferred to the Carbon County Land Company, in October, 1920, the equivalent of over $200,000; that said Independent Company has paid to the State of Utah and Carbon County taxes for the years 1920, 1921, 1922 and 1923 approximately $40,000, or about $15,000 per annum; that the Independent Company has paid out in driving tunnels between 1920 and May 16, 1924, approximately $360,000; that it in the main has carried the burden of this litigation from the time of its commencement in May, 1924, down to the present date. These sums have been paid out and these efforts exerted all in reliance upon the validity of the title to this tract of 1120 acres.

Since the certifications, great changes in population and in methods of work and in the coal industry, and even in fundamental concepts, have taken place. It appears that rules of construction and administration have been changed by executive departments. Even the rules of law and their application by the Courts have taken on different forms. There is a great difference between everyone's outlook in these closing days of 1931 and the closing days of 1904, when this land was certified.

It may be that this Company and its counsel erroneously interpreted the law in October, 1920, but it is submitted that it cannot in justice be held otherwise than that the Company acted honestly and openly, without any intent to defraud either the United States or the State. At no time intervening

between 1920 and the present has this Company undertaken to secure any benefit for which it has not paid a full and adequate consideration.

If the contentions herein made shall be sustained by this Court, the State of Utah and its institutions, particularly the Agricultural College at Logan, Utah, will receive a substantial benefit of $112,000 and accrued interest, but that benefit will inure to the average citizen and finally take form in the education of the youth. The back taxes to be paid to Carbon County will amount to more than $100,000 without penalties, and the taxes to be assessed and collected in the future will be at least $15,000 per annum.

As to the land claimed by the Independent Company, the controversy in one aspect is in fact between the United States and the Agricultural College, an institution which for many years has actively promoted a great national purpose.

Independent of all these considerations, and more important than any one of them or even all of them combined, is the question: Shall the constructive trust theory enunciated by the Circuit Court of Appeals of the Tenth Circuit in this case and in the Amalgamated case (48 Fed. (2d) 156) be made an avenue through which the Statute of Limitations may be avoided and in effect repealed? If the Circuit Court of Appeals is affirmed upon this point, then the stability and security of land titles in not only the State of Utah but in every one of our public land States has been destroyed.

It is submitted that a proper application of the rules of law, as they have been announced by this Court, requires a reversal of the decision of the Circuit Court of Appeals.

Respectfully submitted,

MAHLON E. WILSON,

FRANK K. NEBEKER,

Attorneys for Independent Coal & Coke Company.

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Nos. 42 and 48

In the Supreme Court of the United States

OCTOBER TERM, 1930

STATE OF UTAH, PETITIONER

v.

UNITED STATES OF AMERICA

CARB[illegible] COUNTY LAND COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 849

STATE OF UTAH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 877

CARBON COUNTY LAND COMPANY, A CORPORATION, petitioner

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

Both petitions are for a review of the same decree. The District Court did not render any opinion. The opinion of the Circuit Court of Ap-

peals (No. 849, R. 582–597; No. 877, R. 80–94) is not reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered January 14, 1931. (No. 849, R. 597–598; No. 877, R. 94–95.) The petition for certiorari in No. 849 was filed April 6, 1931, and that in No. 877 was filed April 13, 1931. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the circumstances hereinafter set forth the United States is entitled to a decree against the State of Utah quieting its title to certain public lands certified to the State during the years 1900 to 1904 upon fraudulent representations of the State's grantees.

STATUTE INVOLVED

Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099 (U. S. C., Title 43, Sec. 1166), provides in part:

> SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annual [annul] patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. * * *

STATEMENT

Certiorari is sought to review a decree of the Circuit Court of Appeals ordering some of the petitioners to convey certain land to the United States. The decree was entered after a hearing on amended bill, answer, and other pleadings and proofs. This Court has held that the motion to dismiss the original bill of complaint in this case should be denied. *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640.

The events leading up to the present phase of the instant case are summarized in that opinion (pp. 642–644), as follows:

> The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. * * * Mineral lands were not included. * * * The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature * * * later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.
>
> During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the

petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase the lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were nonmineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact. On the faith of these and other documents, the selections were approved by the Secretary of the Interior and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time

of the applications that the lands contained coal deposits. Although the bill in the present case states that the relief asked was the cancellation of the contracts between the state and Milner and his associates, this allegation is apparently inadvertent, for the record elsewhere indicates that the bill in fact sought the quieting of the government's title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States "is the owner" and "entitled to the possession" of the lands in question and that the defendants "have no right, title or interest, or right of possession," and perpetually enjoining them "from setting up or making any claim to or upon said premises." The Court of Appeals, in affirming the decree, held that "the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of the lands from the United States." [*Milner* v. *United States*, 228 Fed. 431; appeal dismissed, 248 U. S. 594.]

The State of Utah was fully advised of the filing of the original suit in 1907 by the United States. (See footnote 4, p. 14, *infra*.)

Notwithstanding the decree entered in 1914, the State of Utah, in January, 1920, entered into a new contract with the Carbon County Land Company, whereby the State agreed to sell and the company to buy the lands in question for $100 per acre.[1]

[1] The original contract called for a purchase price of $1.50 an acre (No. 849, R. 24, 298–311), all of which was apparently paid to the State. See pp. 11–12, *infra*.

Pursuant to this contract the State patented the lands to the Land Company on February 10, 1920. The Land Company gave its notes to the State for the entire amount of the purchase price, together with a mortgage securing its payment. Apparently no part of this purchase price has ever been paid. (No. 849, R. 27, 38, 52, 556–563; No. 877, R. 27.)

Thereafter, in October, 1920, the Carbon County Land Company sold certain of the lands to the Independent Coal & Coke Company, subject to a portion of the mortgage indebtedness of the Land Company to the State which the Independent Coal & Coke Company agreed to assume. (No. 849, R. 38, 52–53; No. 877, R. 27.) Prior to this transaction the Independent Coal & Coke Company was fully advised of the judgment and decree in the original suit by the United States against Milner and the Carbon County Land Company. (No. 849, R. 22, 392–409.)

In May, 1924, the United States filed a bill in the District Court (No. 849, R. 51; see *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, 645) against the Carbon County Land Company and the Independent Coal & Coke Company seeking to hold those companies as trustees of whatever title they derived from the patent of the State to the Carbon County Land Company. Upon motion of the defendants the District Court dismissed the bill on the ground that the suit was barred by Section 8 of the Act of March 3, 1891, p. 2, *supra*,

which provides that suits by the United States to vacate and annul any "patent" shall be brought within six years after the date of the issuance thereof. Upon appeal the judgment of the District Court was reversed, the Circuit Court of Appeals holding that the Act of March 3, 1891, did not bar the action, and that the allegations of the bill, if proven, entitled the United States to the relief sought. *United States* v. *Carbon County Land Co.*, 9 F. (2d) 517 (C. C. A. 8th). On certiorari this Court affirmed the decision of the Circuit Court of Appeals. *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, *supra*. At that hearing the Attorney General of Utah filed a brief in this Court as *amicus curiae* in behalf of the State.

Thereafter the United States, following the suggestion of this Court, filed an amended bill. (No. 849, R. 1–6; No. 877, R. 1–5.) Answers were filed by the defendant companies asserting that the State of Utah was not bound by the 1914 decree; that at the time of the original certifications to the State the lands in question were not known to be mineral lands; that prior to the contract entered into in 1920 the State had acquired a new and unassailable title to the lands by reason of the Act of March 3, 1891; and that the claims of the defendants rested upon this new title. (No. 849, R. 19–32; 44–56; No. 877, R. 19–36.) The State of Utah, over the objection of the Government, intervened, claiming a mortgage lien upon the lands under the mortgage ex-

ecuted to it by the Carbon County Land Company in February, 1920. The claim of the State was predicated upon substantially the same grounds as were set forth in the answers of the defendant companies. The State also pleaded laches, and asserted that the Government was estopped to maintain the suit by reason of statements made to its Board of Land Commissioners by counsel for the Government at the time of the original action by the United States. (No. 849, R. 33–41.) The United States filed an answer to the complaint in intervention of the State in which it prayed that the mortgage be cancelled, that the title of the United States be quieted as against the State, and in the alternative, that the certifications originally made to the State of Utah be cancelled. (No. 849, R. 65–85.) The State filed a replication to the answer of the United States, containing allegations similar to those contained in its complaint in intervention. (No. 849, R. 87–89.)

After a trial, at which considerable testimony was introduced as to whether the lands were known mineral lands at the time of the original certification (No. 849, R. 101–164), the District Court held that the State was the owner of the lands and decreed that its title be quieted as against the United States. The court further decreed that the patent issued in 1920 by the State to the Carbon County Land Company was void. (No. 849, R. 89–91.) On appeal the judgment of the District Court was reversed. (No. 849, R. 597–598; No. 877, R. 94–95.)

The Circuit Court of Appeals held that the State of Utah was bound by the adjudication of facts in the original action and, further, that, if not so bound, the evidence clearly established that the lands in question were mineral lands and that the original certifications had been secured by fraud, although the State was an innocent instrumentality in securing the certifications. The court found that no affirmative defense to the bill had been established, that the Carbon County Land Company was not a *bona fide* purchaser, that the Independent Coal & Coke Company knew all of the facts as to the original action by the United States when it purchased part of the land from the Land Company, and that since the State in 1920 had parted with the title and claimed only under the mortgage from the Land Company, it was bound as a privy of that company. On the assumption that the State, as the holder of a purchase-money mortgage, should be treated as one who had retained the title and simply contracted to sell, the court held that the State was bound in equity by the decree of 1914, since at the time of the institution of that suit it had been served by the Government with a copy of its bill of complaint, and hence had an opportunity to appear in such suit and defend its title. The court found that the State was in no sense a purchaser for value and that when it issued its patent in 1920 it knew that title had come to it by virtue of misrepresentations of fact made by the Milners and knew that such

fact had been adjudicated. The court further held that the action was not one to cancel the original certifications but was a suit in aid of the 1914 decree and hence was not barred by the Act of March 3, 1891. The court directed that a decree be entered declaring that the titles held by the two companies and the State are impressed with a trust in favor of the United States, ordering the defendant companies to convey such titles as they possess to the United States, and cancelling the mortgage lien and any tax or other liens on the lands held by the State, and quieting the title of the United States against the companies and the State. (No. 849, R. 582–597; No. 877, R. 80–94.)

The Independent Coal and Coke Company joins in the petition of the State of Utah for certiorari. (No. 849.) The Carbon County Land Company has filed a separate petition (No. 877).

ARGUMENT

The State of Utah contends (1) that it is not bound by the decree entered in 1914 in favor of the United States against the Carbon County Land Company and Milner since it was not a party to that suit; (2) that the present action is barred by Section 8 of the Act of March 3, 1891, p. 2, *supra*; and (3) that the original certifications obtained by Utah from the United States were not obtained fraudulently. The United States contends (1) that by virtue of the 1914 decree it became the equitable owner of the lands and all title of the

State of Utah therein, save the bare legal title, was extinguished; (2) that the United States is entitled to a decree quieting its title against the State of Utah, especially in view of the transfer of the legal title by the State to the Carbon County Land Company in 1920; and (3) that the Act of March 3, 1891, does not bar the suit.

The 1914 decree declared that the United States "is the owner" and "entitled to the possession" of the lands in question, and perpetually enjoined the Milners and the Carbon County Land Company "from setting up or making any claim to or upon said premises." (No. 849, R. 3–4.) This Court has already pointed out (in *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, 643, 648) that by virtue of this decree the United States became the owner of all rights which the Land Company acquired under its original contracts with the State.

The land in question was originally sold by the State to Milner and his associates between the years 1901 and 1904, for $1.50 an acre. (No. 849, R. 298–311.) These contracts of purchase were assigned to the Carbon County Land Company, a corporation in which the Milners owned approximately all the stock. (No. 849, R. 200, 238, 356, 357.) The execution of these contracts and their assignment to the Land Company are conceded by the State of Utah. (No. 849, Pet. Br. p. 2.) Their validity is not here questioned by the State. By virtue of these contracts of sale and assignment the

Carbon County Land Company became the equitable owner of the property, the State of Utah retaining the legal title merely as security for the payment of the purchase price. *Independent Coal & Coke Co.* v. *United States, supra,* p. 644.

The purchase price called for by the original contracts was payable in ten annual installments. The evidence does not show whether these payments were made, but in the answer of the United States to the complaint in intervention of the State of Utah it is alleged that the "payments, as required under said contracts were made as therein provided."[2] (No. 849, R. 83.) This allegation was not denied by the State. (No. 849, R. 87–89.) The State of Utah does not assert here that any of the original purchase price now remains unpaid or was unpaid at the time of the entry of the 1914 decree, nor does it assert here a lien for any part thereof.

When, pursuant to a contract for the sale of real estate, the contract price has been fully paid, the entire title is equitably vested in the purchaser. *Jennisons* v. *Leonard,* 21 Wall. 302, 309. It seems clear, therefore, that at the time of the entry of the 1914 decree whatever interest the State obtained under the original certifications belonged in equity to the purchasers. On this date the Carbon County Land Company, as between it and the

[2] In *Milner* v. *United States,* 228 Fed. 431, 436 (C. C. A. 8th), *supra,* it is stated that "the payments as required by the contracts of purchase have been made as therein provided."

State of Utah, was the equitable owner of the lands, and whatever fortification, if any, of the State's title had meanwhile occurred through the running of the Statute of Limitations,[1] inured to the benefit of the Land Company. Accordingly we submit that the effect of the 1914 decree was to take from the Land Company and vest in the United States all interest which that company had acquired either by contract or through the running of the statute. All that remained in the State of Utah was the bare legal title.

Nothing happened after 1914 to divest the United States of its equitable title. The State of Utah does not contend that it stands in the position of a *bona fide* purchaser, and ~~that~~ neither the Carbon County Land Company nor its assignee, the Independent Coal and Coke Company, contends that ~~they are~~ it is a *bona fide* purchaser. The State obviously acquired no new rights by virtue of the patent of the land to the Carbon Coal Company in 1920 and the giving of a mortgage thereof by the Land Company to the State to secure the purchase price. Accordingly, the court below properly decreed that such titles as were possessed by the two companies and the State of Utah are impressed with a trust in favor of the United States, that the mortgage held by the State should

[1] Assuming that the 6-year statute of limitations of March 3, 1891, applies to certifications, that statute had run in favor of the State prior to the 1914 decree, since the latest of the certifications was in 1904.

be cancelled, and the title of the United States quieted as against the two companies and the State.*

But the State contends that the present suit, at least so far as it is concerned, is barred by Section 8 of the Act of March 3, 1891, p. 2, *supra,* which provides that "suits by the United States to vacate and annul any patent" shall be brought within six years after the date of the issuance "of such patents." This contention appears to be without merit.

In the first place, the statute applies only to suits to annul "*patents.*" The term patent has a very specific meaning in the land laws, signifying an instrument of especial solemnity, signed in the name of the President, countersigned by the Recorder of the General Land Office, and taking effect when it is recorded in books especially provided for that purpose. *United States* v. *Schurz,* 102 U. S. 378, 403; *United States* v. *Kern River Co.,* 264 Fed. 412, 416 (C. C. A. 9th). In the instant case the lands were not *patented* to the State of Utah, but *certified* to

---

* Under this theory of the case it does not become necessary to consider whether the 1914 decree was conclusive against the State as to the title of the United States or as to the question whether the original certifications to the State were fraudulently secured. We submit, however, that in equity the State is bound by such decree. Although not a party to the suit in which the 1914 decree was entered, it had actual notice of such suit and an opportunity to appear therein and defend its title. The day after the complaint was filed a copy of the bill was served upon the State Board of Land Commissioners. (No. 849, R. 246.) This bill set

the State. The statutory provisions as to certifications are distinctly dissimilar to those as to patents. See Act of August 3, 1854, c. 201, 10 Stat. 346, reenacted without substantial change as Section 2449 of the Revised Statutes. Since statutes of limitations against the United States are to be strictly construed (*United States* v. *Whited and Wheless,* 246 U. S. 552, 561), it is not unreasonable to assume that Section 8 was intended to apply only to patents and not to other forms of conveyance.[5]

But assuming that the Act of March 3, 1891, applies to certifications, that Act is no bar to this proceeding. The present suit is one in aid of the 1914 decree. So far as the Carbon County Land Company and the Independent Coal & Coke Company are concerned, it is the law of this case that the present suit "is not a suit to cancel the certification." *Independent Coal Co.* v. *United States,* 274

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forth the fraud of the Milners in securing the certifications. It prayed that the certifications should be declared null and void, that the contracts with the State be set aside, and that all clouds upon the title of the United States be removed. (No. 849, R. 165–183.) At the same time the opinion of this Court in *Williams* v. *United States*, 138 U. S. 514, which establishes that the State of Utah was not a necessary party to the original suit, was cited to the Board. (No. 849, R. 246.) Under these circumstances we submit that, in equity at least, the 1914 decree is *res adjudicata* against the State of Utah. See *Kapiolani Estate* v. *Atcherley*, 238 U. S. 119, 139.

[5] See Point V, pp. 24–32, in the brief for the United States in *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, No. 300, October Term, 1926.

U. S. 640, 650, *supra*. No reason appears why the statute should bar the present proceeding against the State when it does not bar the suit as to the two companies. It is true that the amended bill of the United States asked *in the alternative* that the original certifications to the State of Utah be cancelled, but the decree did not purport to cancel such certifications, and as the court below pointed out (R. 593), "the primary relief sought against the state is the same as that against the companies—to impress a trust on such title as it has in aid of the 1914 decree." (See No. 849, R. 84-85.)

That the present suit is not one to cancel the original certifications would seem to be obvious from the fact that no need exists to cancel such certifications in order for the United States to perfect its title. In 1920 the State patented the lands to the Carbon County Land Company, which company thereupon gave a mortgage to the State to secure the purchase price and transferred part of the lands to the Independent Coal & Coke Company. Since the United States possessed the equitable title to the land by virtue of the 1914 decree, and since nothing happened thereafter to cut off this equitable ownership, all that is necessary for the completion of its title is a conveyance by the two companies and a cancellation of the mortgage. In *Independent Coal Co. v. United States*, 274 U. S. 640, *supra*, this Court said (p. 648):

> It having been adjudicated that the government is the true owner of whatever rights

> the Land Company acquired under the earlier contracts with the state, the decree must be deemed either to have transferred those rights to the government or to have determined that the government is equitably entitled to have them so transferred. If the former, the government may assert the rights under the contract against the Land Company, as holder of the legal title, as it might against any other purchaser of the land from the state with notice. *Bird* v. *Hall*, 30 Mich. 374. If the latter, the Land Company could not acquire the lands even through a new and independent contract without a surrender of such rights as it had under the earlier contracts; and it could not make the surrender effective against the United States, the real owner, without its assent, unless the state stood in the position of a purchaser for value without notice. *To these rights the government is equitably entitled, and hence may at its election claim the benefit of their proceeds in the hands of the Land Company.* (Italics ours.)

We believe that the claim of the State of Utah is without substance and that its foundation, if any, rests upon the frailest kind of technicality. We submit that the position of the State is accurately described by the following statement of the court below (No. 849, R. 593):

> That the state has no just claim to these lands is clear. It is in no sense a purchaser for value. It was an innocent conduit through which wrongdoers procured certifi-

> cations by misrepresentation of facts. Mineral lands were not granted to the state. It is true that these 5,564.28 acres stand charged to Utah, but the charge is easily removed, and non-mineral lands can be selected in lieu thereof. As a matter of fact, the state's position in this case is not entirely worthy of it. Asserting its own innocence, it seeks now to appropriate the benefits of the misrepresentation of others, and to secure valuable land which was not granted to it.

The claims of the Carbon County Land Company and its assignee, the Independent Coal & Coke Company, No. 877, appear to have no basis whatsoever. In *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, *supra*, this Court said (pp. 646–647):

> The decree in that suit is conclusive that the company [Carbon County Land Company] was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the state and its officials as agencies to procure the transfer. The decree not only established that the United States was the true and full owner of the land to the exclusion of the defendants, but perpetually enjoined them from setting up or making any claim to the lands. This and the issues of fact there resolved in favor of the United States and pleaded here, lead to the conclusion that none of the defendants, nor any claiming under them with notice, *could by*

> *any legal device, however ingenious, acquire title from the state free from the taint of their fraud.* (Italics ours.)
>
> * * * * *
>
> Equity may follow the property until it reaches the hands of an innocent purchaser for value. Even then the wrongdoer may not reacquire it free of the obligation which equity imposes on one who despoils another of his property by fraud or a breach of trust. The obligation *in personam* to make restitution persists and may be enforced by compelling a return of the property itself whenever and however it comes into his hands.

Assuming that at the time of the execution of the 1920 contract the State of Utah had acquired an unassailable title to the lands in question, it could not convey such title or any interest therein to the *Carbon County Land Company* so that such title or interest would be beyond the reach of the United States under the 1914 decree. It has been definitely and finally adjudicated that the Land Company possesses no standing to attack the decree of the court below. Since the Independent Coal & Coke Company knew all about the 1914 decree and the events leading thereto when it contracted to buy a portion of the lands from the Land Company it stands in no better position than that company.

CONCLUSION

In this brief we have endeavored to set forth our contentions for the guidance of the Court, and

should have no hesitation in opposing the issuance of a writ if a sovereign State were not a petitioner herein. Where one of the States of the Union, engaged in litigation with the United States over title to property, seeks review in this Court, we believe that the mere existence of such a controversy between a State and the United States necessarily presents a question worthy of review in this Court, quite irrespective of the merits of the controversy. For this reason, and this reason alone, we do not oppose the issuance of a writ in this case. If the petition filed by the State of Utah is granted we believe the petition filed by the Land Company should also be granted so that there may be consistency in the final determination of the rights of the parties.

Respectfully submitted.

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MAY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

No. 43 and 44

In the Supreme Court of the United States

October Term, 1931

STATE OF UTAH AND INDEPENDENT COAL & COKE COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

CARBON COUNTY LAND COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 42

STATE OF UTAH AND INDEPENDENT COAL & COKE Company, petitioners

v.

UNITED STATES OF AMERICA

No. 48

CARBON COUNTY LAND COMPANY, A CORPORATION, petitioner

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

Upon motion to dismiss the original bill the District Court rendered no opinion; the opinion of the Circuit Court of Appeals for the Eighth Circuit is reported in 9 F. (2d) 517, and the opinion of this Court is reported in 274 U. S. 640. Following the trial on the merits, the District Court rendered no opinion. The opinion of the Circuit Court of Ap-

peals (R. 611–625) is reported in 46 F. (2d) 980. Both petitions involve the same decree of the court below.

JURISDICTION

The decree of the Circuit Court of Appeals was entered January 14, 1931. (R. 626.) The petition for certiorari in No. 42 was filed April 6, 1931, and that in No. 48 was filed April 13, 1931. Writs of certiorari were granted May 18, 1931. (R. 630.) Jurisdiction is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether under the circumstances hereinafter set forth the United States is entitled to a decree quieting its title to certain public lands certified to the State of Utah during the years 1900 to 1904, and to the other relief awarded by the court below.

STATUTES INVOLVED

The statutes which the petitioners assert are involved are printed at pp. 2–7 of the brief for the State of Utah, No. 42.

STATEMENT

This is a suit in equity brought by the United States to quiet its title to certain lands. This Court considered the original bill of complaint in *Independent Coal & Coke Co.* v. *United States*, 274 U. S. 640, determined its sufficiency, held that a motion to dismiss it should have been denied, and in doing so passed upon substantially all the contentions now presented. The case is now here again

upon writ of certiorari to review a decision of the Circuit Court of Appeals for the Tenth Circuit reversing a decree of the District Court dismissing the bill as amended after final hearing, and directing the entry of the decree prayed for by the United States. (R. p. 626.)

When the case was here before, this Court summarized the circumstances, since found by the court below, under which title to these lands was acquired from the United States by the State of Utah and equitable title thereto was transferred by the State to the Carbon County Land Company. The summary (pp. 642-644) follows:

> This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances:
>
> The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (Sections 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See *Milner* v. *United States*, 228 Fed. 431, 439; *United States* v. *Sweet*, 245 U. S. 563; *Mullan* v. *United States*, 118 U. S. 271, 276; Sec. 2318

R. S. The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.

During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase the lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were nonmineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact.

On the faith of these and other documents, the selections were approved by the Secretary of the Interior, and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. * * * the bill * * * sought the quieting of the government's title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States "is the owner" and "entitled to the possession," of the lands in qeustion and that the defendants "have no right, title or interest, or right of possession," and perpetually enjoining them "from setting up or making any claim to or upon said premises." The Court of Appeals, in affirming the decree, held [*Milner* v. *United States*, 228 Fed. 431; appeal dismissed, 248 U. S. 594] that "the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of these lands from the United States."

The State of Utah was fully advised of the filing of the original suit in 1907 by the United States. On January 8, 1907, a copy of the bill of complaint in that suit (R. 175–195) was handed to the Board of Land Commissioners of the State of Utah by a Special Assistant to the Attorney General, who at that time informed the Board that the Attorney General had caused the same to be filed in the Federal court. (R. 263, 265.) He further stated that the legal title to the land was then in the State of Utah and that if the Government were successful in the *Milner* suit the title still would be in the State. He stated that "We do not seek to deprive you of these lands, but we do seek to prevent these valuable claims from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it." He then read to the Board the opinion of this Court in *Williams* v. *United States,* 138 U. S. 514. (R. 263-264.)

Notwithstanding the decree entered in 1914, after notice to it of the pendency of the suit, the State of Utah in January, 1920, entered into a new contract with the Carbon County Land Company (a party to that suit which had been there adjudged to have no right, title or interest or right of possession in the lands involved and had been perpetually enjoined "from setting up or making any claim to or upon said premises" (*Independent Coal Company* v. *United States, supra,* pp. 643–644), whereby the State agreed to sell, and the company to buy, the identical land involved in the first suit for $100 per

acre [1]. Pursuant to this contract the State patented the lands to the Land Company on February 10, 1920. In connection with this transaction the Land Company gave its notes to the State for the entire amount of the purchase price, payable: $100,000 on January 2, 1930 (R. 384), $200,000 on January 2, 1940 (R. 385), $256,428 on January 2, 1950 (R. 386). No interest was to be paid for the first five years. A mortgage on the lands involved, securing payment as aforesaid (R. 586), was executed by the Land Company on January 2, 1920. No part of the principal or interest of said notes has been paid to the State. (R. 42, 43, 57.)

Thereafter, in October, 1920, the Land Company sold 1,120 acres of the lands in controversy to the Independent Coal & Coke Company. The sale to the Coal Company involved some 400 acres of additional land not involved in this suit. The Coal Company purchased the land subject to $112,000 of the mortgage indebtedness of the Land Company to the State, which the Coal Company agreed to pay, and having increased its capital stock, transferred to the Land Company, in payment for the entire 1,520 acres, 500,000 shares of its capital stock having a par value of $1 per share and a market value of approximately 60 cents a share, and received from the Land Company a warranty deed to the en-

[1] The original contract between the State and the Milners provided for a purchase price of $1.50 an acre. For the purpose of this suit full payment of all sums due under the original contract has been admitted by the State. See point I of the argument.

tire tract of land so purchased. (R. 429–430, 436, 575–576.) The State of Utah agreed that on payment of the sum of $112,000 to it, it would release the mortgage executed by the Land Company on the 1,120 acres of the land so purchased by the Coal Company. (R. 409.)

When the Coal Company entered into this transaction with the Land Company it was fully advised of the judgment and decree in the *Milner* suit, knew of the fraud by which the defendants to that action had procured the certification of the land to the State, and that the land was known coal land at the time of such certification. (R. 409–425, 615.) It appears that before the purchase was consummated the Coal Company took the advice of counsel as to the validity of the title to the lands in question (R. 409–425) and made the purchase only after being advised by counsel that the title had within it certain elements making it appear to be voidable unless "the Statute of Limitations applies and has run" (R. 420).

Since the State of Utah did not conform its action to the decree in the first suit, and the companies acted in flagrant violation of that decree, the United States brought the present action, which "is in aid of the first" (*Independent Coal Company* v. *United States, supra,* p. 642), against the Carbon County Land Company and the Independent Coal & Coke Company and others whose interests are not now material. The original bill in

this suit was filed in May, 1924, and the relief asked was that a trust be impressed in favor of the plaintiff; that the defendants be ordered to convey whatever title they had subject only to any mortgages which the State may have retained in conveying the legal title; and that the defendants be enjoined from mining coal. (R. 175–195.) (See *Independent Coal Company* v. *United States, supra,* p. 645.) Upon motion of the defendants the District Court dismissed the original bill on the ground that the suit was barred by Section 8 of the Act of March 3, 1891 c. 561, 26 Stat. 1095, 1099, which provides that suits by the United States to vacate and annul any "patent" shall be brought within six years after the date of the issuance thereof. Upon appeal the judgment of dismissal was reversed, the Circuit Court of Appeals for the Eighth Circuit holding that the Act of March 3, 1891, did not bar the action and that the allegations of the bill if proven entitled the United States to the relief sought. *United States* v. *Carbon County Land Co.,* 9 F. (2d) 517 (C. C. A. 8th). A petition for certiorari was filed on behalf of the Carbon County Land Company and the Independent Coal & Coke Company February 17, 1926. On March 8, 1926, the State of Utah filed a suggestion as *amicus curiae* in support of the petition, alleging its interest in the questions presented by the petition. A writ of certiorari was granted by this Court March 22, 1926. 270 U. S. 639. The Attorney General of

the State of Utah filed a brief as *amicus curiae* in behalf of the State.[2] This Court affirmed the decision of the Circuit Court of Appeals. *Independent Coal Company* v. *United States, supra.* In accordance with the suggestion contained in the opinion of this Court the United States filed an amended bill of complaint (R. 1), which clarified the allegations with respect to the relief sought in the first suit and which otherwise differs from the original bill only in certain minor respects. The amended bill in substance states the same cause of action and asks the same relief as did the original bill.

Answers were filed on behalf of the Land Company and the Coal Company alleging that the State of Utah was not bound by the 1914 decree; that at the time of the original certifications to the State the lands in question were not known to be mineral lands; that prior to the contract entered into in 1920 the State of Utah had acquired a new and un-

[2] In this brief it was contended on behalf of the State (1) that the original certifications by the United States in 1901 and 1904 conveyed title from the United States to the State of Utah; (2) that the decree in the first suit did not in any way affect the title of the State of Utah to the lands in question; (3) that the State of Utah had a valid title to the lands in January and February, 1920, that it had a right to convey the same to whomsoever it saw fit, and that the mortgage held by the State was in all respects valid; (4) that at the time of the commencement of this action the United States had no interest in the land in question, and (5) that this action was barred by Section 8 of the Act of March 3, 1891.

assailable title to the lands by reason of the Act of March 3, 1891, and that the claims of the answering defendants rested upon this new title; that the United States was estopped from questioning the title of the State's grantees by the statements made by a Special Assistant to the Attorney General to the Board of Land Commissioners of the State relating to the purpose of the first suit; that the United States was barred by laches; and that the United States could not equitably reclaim the land from the State without transferring other lands to the State in lieu of lands involved in this suit and repaying the defendants for improvements placed on the land.

The Government by replication pleaded the known coal character of the land at the time of the certification, the adjudication in the *Milner* case of this fact and of the fraud, against the Land Company, and notice of the fraud and of its adjudication to the Coal Company at the time of its purchase from the Land Company. (R. 62, 63, 66, 67.)

The State of Utah, over the objection of the Government, intervened, alleging in its complaint in intervention (R. 36) that if the defendants were deprived of the property this would result in a claim by the defendants against the State (R. 36); that the State had title, as pleaded in the answers of the other defendants; that the Government was estopped (R. 39-40); that the Government was barred by laches and limitations (R. 43); that the plain-

tiff by this suit had cast a cloud upon the title of the State (R. 44); that the adjudication in the first suit was not binding upon the State, and after certain other allegations the State sought a decree quieting its title against the United States and adjudging the mortgage from the Land Company to be a valid lien. (R. 44.)

The United States filed an answer to the complaint in intervention, which contained denials and alleged as a counterclaim the entire history of the earlier litigation, the known coal character of the land at the time of the certification to the State, the fraud of the Milners and the Carbon County Land Company established in the former suit, and asked a decree declaring a constructive trust, the quieting of its title against the State, the cancellation of the mortgage held by the State or, if such relief was not granted, then, in the alternative, a decree cancelling the certifications of the land to the State and the patent from the State to the Land Company. (R. 70–93.) The State filed a replication denying the known mineral character of the land at the time of certification and setting up the statute of limitations limiting the time for the institution of suits to cancel patents. (R. 95, 96.)

Upon the trial testimony was introduced by both sides as to whether the lands were known mineral lands at the time of the original certification. (R. 106–174, 441–459.)

The District Court held that the State was the owner of the lands and decreed that its title be

quieted as against the United States. (R. 97–98.) The court further decreed that the patent issued in 1920 by the State to the Land Company was void. (R. 98.) On appeal the judgment of the District Court was reversed. (R. 610–625.)

The court below held that the State was bound by the adjudication of facts in the original action and, further, that if not so bound the evidence in this action established that the lands in question were mineral lands and that the original certifications had been secured by fraud, although the State was an innocent instrumentality in securing the certifications. The court found that no affirmative defense to the amended bill had been established; that the Land Company was not a *bona fide* purchaser; that the Coal Company knew all the facts as to the original action by the United States when it purchased part of the land from the Land Company; and that since the State in 1920 had parted with title and claimed only under a mortgage from the Land Company, it was bound as privy of that company. On the assumption that the State was not bound as privy, the court held that the State was bound in equity by the decree of 1914. The court further held that the State was in no sense an innocent purchaser for value, and that when it issued the patent in 1920 it knew that the legal title which it had was acquired through misrepresentations made by the Milners and knew that this had been adjudicated in the first suit. The court further held that the action was not one

to cancel the original certifications but was a suit in aid of the 1914 decree and hence was not barred by the Act of March 3, 1891.

The court directed that a decree be entered impressing a trust upon the title held by the Land Company, the Coal Company, and the State in favor of the United States, ordering the defendant companies to convey to the United States, and cancelling the mortgage lien and any tax or other liens held by the State, and quieting the title of the United States against the defendant companies and the State. (R. 625.)

The District Court was instructed to enter a decree—

> * * * including therein that the titles held by the Carbon County Land Company and the Independent Coal and Coke Company and the State of Utah are impressed with a trust in favor of the United States of America; that the Carbon County Land Company and the Independent Coal and Coke Company convey to the United States of America the titles which stood in their names when this suit was brought, failing which the decree shall operate as such conveyance; that said decree shall operate as a cancellation of the lien of the mortgage held by the State of Utah and of any tax deeds or liens thereon; that the title of the United States of America be quieted; that the Carbon County Land Company, the Independent Coal and Coke Company and the State of Utah, and anyone claiming under them,

be enjoined from asserting any claim to the title or possession of the premises * * *. (R. 626.)

When petitions for certiorari were filed in No. 42 on behalf of the Independent Coal & Coke Company and the State of Utah, and in No. 48 on behalf of the Carbon County Land Company, the United States did not oppose the petition on behalf of the State, but its failure to oppose was placed upon the ground that since the case involved a controversy between a State and the United States there was necessarily presented a question worthy of review in this Court irrespective of the merits, and the Government did not oppose the petitions on behalf of the companies so that the final disposition of the case might be consistent.

SUMMARY OF ARGUMENT

The decision of this Court in *Independent Coal Company* v. *United States,* 274 U. S. 640, establishes that the decree entered in 1914 in the former suit was conclusive that the Land Company was a party to the fraud used in obtaining a certification of public lands to the State of Utah, and that neither the Land Company nor any one claiming under it with notice could by any device, however ingenious, acquire title to the lands from the State free from the taint of the fraud. The previous decision of this Court also establishes that the equitable rights of the United States under the 1914 decree could be asserted against anyone who

claimed an interest in the lands, except an innocent purchaser for value.

The court below found that the Coal Company was not an innocent purchaser for value and accordingly the decree entered by the court below was authorized by the former decision of this Court. The State of Utah was not an innocent purchaser for value. Its interest in land under the mortgage executed by the Land Company in 1920 was obtained with knowledge of the suit which resulted in the decree of 1914 and of the nature and effect of that decree. It is unnecessary to determine whether the State was bound by the 1914 decree in the same sense that the Land Company was bound, since in any event the interest of the State under the mortgage was invalid as against the equities of the United States. Furthermore, the State was bound in equity by the 1914 decree under the rule announced in *Williams* v. *United States*, 138 U. S. 514, and in view of the peculiar circumstances of this case.

Under the opinion of this Court in the *Independent Coal & Coke Company* case, *supra*, the law of this case is that this is not a suit to cancel a certification and accordingly it is unnecessary to decide whether Section 8 of the Act of March 3, 1891, as amended, limits the time within which a suit may be brought to cancel a certification. Cancellation of the certification to the State was not asked in the amended bill of complaint, nor was such cancella-

tion necessary to enable the United States to obtain the fruits of the 1914 decree to which it was entitled.

It was established and found by the court below in this suit, to which the State was a party, that the lands certified to the State were known mineral lands when certified.

Possible hardship to the State or the Coal Company is not a reason for denying relief to the United States. The petitioners intentionally disregarded the 1914 decree and acted, with knowledge, in derogation of the rights of the United States.

ARGUMENT

I

THE RIGHT OF THE UNITED STATES TO RELIEF IN THIS SUIT IN AID OF THE 1914 DECREE HAS BEEN ESTABLISHED

The previous decision of this Court in affirming the decree in this case, which reversed the decree dismissing the original bill of complaint (*Independent Coal Company* v. *United States*, 274 U. S. 640), disposes of most, if not all, of the arguments now advanced on behalf of petitioners.

As to the petitioner Carbon County Land Company, that decision establishes that the 1914 decree was conclusive that the Land Company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the State and its officials as agencies to secure the transfer; that the United States was the true and full owner of the land to the exclusion of the Land Company; and that neither the Land Company nor any one claim-

ing under it with notice could by any legal device, however ingenious, acquire title from the State free from the taint of its fraud. That decision further establishes that this is a suit in aid of the former decree and is an appropriate method of securing the benefit of the first decree. This Court also held that the decree transferred from the Land Company to the United States all rights which the Land Company acquired under the original contracts with the State, or conclusively established that the United States was equitably entitled to have them transferred. Accordingly, we submit that by the previous decision of this Court in this case it is established that the United States is entitled to the relief awarded by the court below against the Land Company.

As to the petitioner Independent Coal & Coke Company, the decision of this Court in *Independent Coal Company* v. *United States, supra,* establishes that if it was a subsequent purchaser from the Land Company and had notice of the fraud perpetrated by the Land Company, it could not, as against the United States, acquire title free from the taint of that fraud. The Court held that if it was such a purchaser with notice, the United States was entitled to the relief sought against it.

It is entirely clear that the interest of the Coal Company in the portion of the lands involved, claimed by it, was acquired from the Land Company after the State of Utah issued its patent to the Land Company. The patent from the State

to the Land Company, which included the lands claimed by the Coal Company, was issued on February 10, 1920. (R. 382.) The sale by the Land Company to the Coal Company took place in October, 1920. (R. 436.) The record shows (R. 409–425), and the court below found (R. 619), that at the time of the purchase by the Coal Company it knew all of the facts about the history of the land and had knowledge of the decree in the former suit establishing the fraud by which the original certifications were procured. Before taking title it sought the advice of counsel as to the condition of the title. (R. 409–425.) There can be no doubt, therefore, that the Coal Company purchased with notice of the fraud established by the 1914 decree and elected to take the risk involved in the acquisition of a title with known infirmities. Accordingly, under the decision of this Court in *Independent Coal Company* v. *United States, supra,* the United States was entitled to a decree imposing a constructive trust upon the portion of the lands acquired by the Coal Company, and the court below properly awarded that relief against the Coal Company.

In an effort to escape the effect of the previous decision of this Court in the *Independent Coal Company* case, it is now contended by the Coal Company that it had a direct relation to the State with respect to the lands in controversy, and asserting that the title of the State is unassailable, it claims a right to clothe itself with the State's title.

It is clear, however, that the purchase of the lands in question was made by the Coal Company from the Land Company, and that its title thereto depends solely upon its transaction with the Land Company in October, 1920. (R. 429–430, 436, 575–576.) The only relationship between the Coal Company and the State appears from a certified copy of the minutes of the State Board of Land Commissioners at a meeting held on December 14, 1920 (R. 409), which shows that the secretary of the Board was authorized to advise the Coal Company that when the portion of the mortgage on the lands patented by the State to the Land Company, assumed by the Coal Company, amounting to $112,000, was paid, a release would be executed to free the lands acquired by the Coal Company from the mortgage held by the State. This did not constitute the Coal Company a purchaser from the State and was a mere recognition of the contract between the Land Company and the Coal Company and an undertaking to release a portion of the mortgage upon the lands patented to the Land Company when the portion of the contract between the Coal Company and the Land Company requiring the former to pay $112,000 was performed.

It is contended on behalf of all the petitioners that the State was not bound by the 1914 decree and that this suit is barred by the statute of limitations. We shall discuss the statute of limitations later in the argument. We submit that for the purpose of

this case it is unnecessary to determine whether or not the State was bound by the 1914 decree.

The land in question was originally sold by the State to Milner and his associates between 1901 and 1904 for $1.50 an acre. (R. 90–91.) These contracts were assigned to the Land Company, a corporation in which the Milners owned approximately all the stock. (R. 91.) The validity of these contracts is not questioned by the State. By these contracts and their assignment to it the Land Company became the equitable owner of the property, the State retaining legal title merely as security for the payment of the purchase price. *Independent Coal Company* v. *United States, supra,* page 644. The purchase price under the original contracts was payable in ten annual installments. While no evidence was offered to show whether or not these payments were all actually made, the portion of the answer of the United States to the State's complaint in intervention which was pleaded as a counterclaim alleged that the "payments, as required under said contracts, were made as therein provided." (R. 91.) The reply of the State to this counterclaim contained no denial of this allegation. (R. 95–96.) It is asserted in the brief on behalf of the State that it had a substantial property interest in the lands at the time of the entry of the 1914 decree and that it still has such interest. (Br. 32.) It is not stated expressly that the State did not receive payment in full under the original contracts. The State contends, however, that

under Equity Rule 31 the allegation of payment contained in the answer of the United States to the complaint in intervention is deemed denied. (Br. 33.) The allegation in the answer referred to, however, was not a mere allegation of new matter, which would, under the rule, be deemed denied, but it was a part of the Government's counterclaim. Accordingly, under Equity Rule 31 it would seem clear that the allegation is admitted by failure to deny it, and therefore the State is not in a position to claim, as it now appears to do, that it was not fully paid under the original contracts, and for the purpose of this case full payment must be deemed to be admitted.[3] See *Clifton* v. *Tomb*, 21 F. (2d) 893 (C. C. A. 4th).

Upon payment in full the Land Company became the owner in equity of the entire title to the lands. *Jennisons* v. *Leonard*, 21 Wall. 302, 309. Accordingly, at the time of the entry of the 1914 decree whatever interest the State had under the original certifications belonged in equity to the Land Company. The 1914 decree had the effect either of transferring the equitable title which the Land Company then had to the Government or it was a determination that the Government was equitably entitled to a transfer of such rights. If the former, the Government was entitled to assert the

[3] In *Milner* v. *United States*, 228 Fed. 431, 436 (C. C. A. 8th), *supra*, it is stated that "the payments as required by the contracts of purchase have been made as therein provided."

rights against the Land Company (*Independent Coal Company* v. *United States, supra,* p. 648) and anyone claiming under it who was not a *bona fide* purchaser. It would seem to follow that if this was the effect of the decree the United States had the same right which the Land Company would have had as equitable owner to a transfer of legal title from the State, which no longer had any right to that title as security. If the 1914 decree did not have the effect of transferring the rights of the Land Company to the United States and only constituted an adjudication that the United States was equitably entitled to those rights, this Court has held that the Land Company could not acquire any title to the lands even through a new and independent contract without a surrender of the rights under the earlier contracts, and it could not make a surrender of such rights effective against the United States without its assent, unless the State stood in the position of a purchaser for value without notice. (*Independent Coal Company* v. *United States, supra,* p. 648.)

It is not contended by the State that it was a purchaser for value without notice of any interest in the land after the entry of the 1914 decree. The State had notice of the commencement of the first action in 1907, and must be deemed to have had notice of all the proceedings in that action. (R. 263–265.) It can not be said to be a purchaser for value of any rights it now claims to hold because it parted with the entire equitable title when it con-

tracted to sell the lands to the Milners and thereafter received payment in full of the agreed purchase price. (See *Independent Coal Company* v. *United States supra,* p. 644.) So far as appears it never cancelled the contracts with the Milners and it never did acquire any claim of title excepting under the purchase money mortgage executed and delivered by the Land Company in 1920. But the delivery of the patent to the Land Company in 1920 and the execution of the purchase money mortgage to secure payment of the newly arranged purchase price for the lands covered by the patent did not make the State a purchaser for value. If the State then became a purchaser under the mortgage, it was in privity with the Land Company, which could convey no interest in the land unaffected by the 1914 decree of which the State had notice. Nor was any value given by the State at that time. The delivery of a patent in an attempt to vest a title which it had no right to convey to the Land Company, and which the Land Company had no right to receive from it, could not constitute value which would be recognized in equity.

By the patent to the Land Company in 1920 the State divested itself of legal title to the land, retaining only its interest under the mortgage executed by the Land Company. That purported to give it a lien, which could have no validity against the United States, to secure the payment of the purchase price of land which it could neither convey to

the Land Company nor of which the Land Company could receive title except under a constructive trust for the United States. If the 1914 decree be regarded as transferring to the United States all equitable rights of ownership in the land, the transfer of legal title by the State to the Land Company constituted the United States the owner in equity of the entire title with a right to such equitable remedies as might be necessary to remove the cloud created by the mortgage, and the United States had the same right if the effect of the 1914 decree was only to determine that the United States was equitably entitled to the then existing equitable ownership of the Land Company. On any theory the only thing remaining in the State after the patent executed in 1920 was the lien created by the mortgage which was invalid as against the United States.

We submit that the court below properly decreed that the title was impressed with a trust in favor of the United States and that the mortgage held by the State should be cancelled and the title of the United States quieted as against the companies and the State so that the decree of 1914, openly violated by all the petitioners, might be given effect.

In substance the situation of the State is that although it had knowledge of the 1914 decree which adjudged that the lands upon which it now claims to have a lien, created after the decree, were fraudulently obtained from the United States, it nevertheless asserts a right to retain such lien. But

that lien is upon lands to which it did not at the time the lien was created have equitable title and if it is allowed to keep that lien it is, in the most direct way, profiting by the fraud practiced upon the United States. One who takes with notice can not profit by the fraud of another or escape the hot pursuit of equity, which abhors fraud. *McIntire* v. *Pryor,* 173 U. S. 38, 52. See Pomeroy's Equity Jurisprudence, 4th ed., sec. 918. The lien was granted by the Land Company, which had been adjudicated to have and to be able to acquire no interest in the land as against the equities of the United States. Having none, it could, in equity, grant none and therefore whether the State is or is not bound by the 1914 decree it can not obtain the benefits of the fraud from one who has been forbidden to profit for itself directly or to do so indirectly by assuming to deal with any interest in the land.

In the brief filed on behalf of the State of Utah as *amicus curiae* in *Independent Coal Company* v. *United States, supra,* the contention was made that the State was not bound by the 1914 decree. As the opinion of this Court does not deal with that contention except indirectly, we suggest that this indicates that, as we contend, the determination of whether the State was bound by the decree is unnecessary to a disposition of this case, because, whether it was or not, the United States was entitled to the equitable relief awarded by the court below.

While it seems to us unnecessary to consider whether the 1914 decree was conclusive against the

State as to the title of the United States or as to the fraud involved in procuring the original certifications, we submit that the State was bound by that decree. Although the State was not a party to the suit, it was given immediate notice of the commencement thereof and a copy of the bill of complaint was served upon the State Board of Land Commissioners. At the same time the opinion of this Court in *Williams* v. *United States,* 138 U. S. 514, was read to the Board. In that case this Court announced the alternatives with which a State is faced when litigation is commenced by the United States under similar circumstances. The Court there said (p. 516):

> The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which

a title to real estate has been wrongfully obtained from the general government.

The brief for the State contains (Br. p. 22) a statement of the reasons for its failure to conform to the decree in the first suit. Since the United States is equitably entitled to the relief granted by the court below, in any view, the reasons for the failure of the State to conform to the decree in the first suit in accordance with the suggestion of this Court under similar circumstances in the *Williams* case, *supra*, are irrelevant, for it is enough that the State has not conformed.

The court below held that the State was concluded by the decree in the former suit because it was privy in title to the Land Company, among other reasons. This view was based upon the fact that the only present interest of the State in the lands is under the mortgage delivered to it by the Land Company. This we submit is a correct view of the situation under the peculiar circumstances of this case. The State when it took the mortgage knew that the Land Company could transfer to it no interest in the land free of the equities established in favor of the United States by the decree in the prior suit. In accepting the mortgage from the Land Company it accepted it subject to all of those equities of which it had notice. It therefore in a sense stood in privity to the Land Company and in equity was bound by the decree. In any event, the protection of a purchase money mortgagee is based only on equit-

able principles, and that protection should not be afforded where the mortgagee is situated as the State is here, since the transaction in which the mortgage was obtained was so obviously designed to circumvent the decree of 1914 and to enable the Land Company to escape the effects of the fraud of which it had been adjudged guilty.

II

THE RIGHT TO MAINTAIN THIS SUIT IS UNAFFECTED BY ANY STATUTE OF LIMITATIONS

It is contended in the briefs of all of the petitioners that this is a suit to cancel the original certification of the lands to the State and that the suit is barred by Section 8 of the Act of March 3, 1891, as amended. Section 8 limits the time within which the United States may bring suit to vacate and annul any patent issued by the United States. It is confined by its terms to patents and does not in terms include certifications. The petitioners contend that for various reasons it should be held to include certifications. This statute as one of limitations against the United States is to be narrowly construed. See *United States* v. *Whited & Wheless,* 246 U. S. 552, 561. We do not believe that the statute should be construed to include certifications, but we contend that this Court has authoritatively determined that this is not a suit to cancel a certification. (*Independent Coal Company* v. *United States, supra,* p. 650.) That is the law of this case and accordingly we deem it unnec-

essary to argue the question whether or not Section 8 limits the time for bringing suits to cancel certifications, for this is not such a suit. The court below also held that this was not a suit to cancel certifications. An examination of the prayer for relief contained in the amended bill of complaint (R. 5–6) shows that the plaintiff does not seek a cancellation of the certification. While the answer of the United States to the State's petition in intervention asks, as alternative relief, the cancellation of the original certification, that is sought only in the event that the primary relief is not granted and the primary relief sought against the State was the same as that sought against the company petitioners in the amended bill.

That this is not a suit to cancel the original certifications seems to be obvious from the fact that the decree of the court below did not direct such cancellation, and, furthermore, there is no need to cancel such certifications for the United States to perfect its title and receive the full relief to which it was entitled under the 1914 decree. By virtue of that decree the United States either possessed equitable title to the land with a right to a transfer of legal title, or became equitably entitled thereto. By the transaction between the State and the Land Company in 1920, legal title to the land was conveyed by the State subject only to its lien under the mortgage executed by the Land Company. Since nothing has happened to divest the United States of its equitable ownership or its

equitable right to ownership, all that is necesary to complete its title is for the two companies to convey the legal title vested in them and for the mortgage held by the State to be cancelled. The decree of 1914 established the right of the United States to a conveyance by the two companies, if thereafter they should ever acquire legal title. The execution of the mortgage was necessarily an empty gesture, since the Land Company had no equitable right in the land which it could convey. The mortgage is a mere cloud on the Government's title without substance or effect, and since the State was a party to this suit that cloud could be removed herein. Neither the requirement that the two companies should convey to the United States nor that the mortgage of the State should be cancelled operated upon the original certifications. This suit was therefore in no sense to cancel those certifications and such cancellation was entirely unnecessary. As the court below said, "It is true that these 5,564.28 acres stand charged to Utah, but the charge is easily removed, and non-mineral lands can be selected in lieu thereof." (R. 622.)

III

FRAUD IN PROCURING THE ISSUANCE OF THE ORIGINAL CERTIFICATION WAS ESTABLISHED IN THIS CASE

Since this is not a suit to cancel certification, and since it is unnecessary to determine whether the State was bound by the 1914 decree, it is perhaps

unnecessary to refer to the finding made by the court below that fraud in the issuance of the original certification was established in this case in which the State was a party. However, as that point is argued, it is perhaps proper to discuss it briefly.

At the trial of this case there was introduced the transcript of the testimony of one Joseph A. Taff, taken in the *Milner* case, and it was stipulated by counsel for the State and the two companies that such testimony might be read in evidence with the same effect as if the witness were personally present, subject to objections as to competency, relevancy and materiality. (R. 103, 106.) The testimony so offered showed that the land was known to be coal land at the time the Government certified it to the State as agricultural and grazing land. Testimony was offered on behalf of the petitioners which was in conflict with this testimony. The court below, however, found that the lands were in fact mineral lands not subject to grant and that the Milners knew the facts when they participated in obtaining the original certifications. (R. 618.) This finding does not depend upon the admissibility against the State of parts of the record in the *Milner* case. Irrespective of the objection made on behalf of the petitioners to the admissibility of parts of the record in the *Milner* case, the stipulation authorizing the use of Taff's testimony in this case, and the testimony so used, sufficiently sustain the finding made. Accordingly, irrespective of

the admissibility of parts of the record in the *Milner* case, there is a finding in this case supported by evidence that the lands were known mineral lands when certified to the State.

In this connection the original rule of the General Land Office requiring exposure of commercially valuable coal before lands could be listed as mineral is irrelevant. It has been conclusively determined that the rule was erroneous. *Diamond Coal and Coke Co.* v. *United States,* 233 U. S. 236.

As against the two companies the 1914 decree establishes fraud in the procurement of the original certifications, and if that decree does not establish such fraud against the State the court below has found upon evidence in this case, to which the State is a party, that at the time of such certifications the lands certified were known to be coal lands.

The Independent Coal & Coke Company refers to circumstances indicating that it has expended sums of money upon the lands held by it, apparently for the purpose of showing that it would be a hardship if it were compelled to convey these lands to the United States. (Br. 54, 55.) At the same time it announces its willingness to pay any amount that shall be required on an accounting. (Br. p. 19.) If there is hardship in complying with the decree of the court below, it is a hardship which the Coal Company risked with full knowledge of the equitable rights of the United States, and it knew

when it purchased a portion of the lands from the Coal Company that its title might be questioned by the United States. The expenditures which have been made, therefore, were made at its peril, and they furnish no reason for denying the equitable relief to which the United States is clearly entitled.

It is also suggested in the brief for the Coal Company (Br. p. 55), that if its contentions are sustained the State of Utah and its institutions will receive a benefit of which they will be deprived if the decree is affirmed. But neither the State nor its institutions had any right to this land, which should have been reconveyed to the United States immediately after the decree in 1914, when the State should have conformed its action to the decision of the courts, as suggested in the *Williams* case, *supra*.

CONCLUSION

The judgment of the court below was correct and should be affirmed.

Respectfully submitted,

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No._____

IN THE

Supreme Court of the United States

October Term, 1931

CARBON COUNTY LAND COMPANY,
a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Carbon County Land Company, a corporation, complains of the decree of the United States Circuit Court of Appeals of the Tenth Circuit, rendered in that court on January 14, 1931, and respectfully petitions for a writ of certiorari to review the same as against the United States of America, respondent above named. (R. 592).

EFFECT OF DECREE: The decree ordered and directed by the Circuit Court of Appeals cancels and annuls all right, title and interest of the State of Utah in and to the land which is the subject of this litigation. This decree holds that: (1) the State of Utah is bound in equity by a decree entered in a suit to which the State of Utah was and could not have been made a party without its consent; (2) that the statute of limitations barring actions to vacate or annul grants

of lands made by the United States enacted for the purpose of making safe and secure the title to such lands, may be avoided by an action commenced to impress such land with a constructive trust, and letting the decree therein have the effect of a reconveyance; (3) that an act, honest when done, can be made fraudulent by a retroactive application of a rule adopted ten years after the commission of the act; (4) that after a sovereign state had acquired and held for fully sixteen years valid and legal title to public lands, such state had no right, power or authority to transfer and convey such title so legally held and acquired by it; (5) that this petitioner by said decree was denied the right to acquire through a valid lawful transaction, property owned, possessed and acquired by a sovereign state; (6) that if said decree is allowed to stand, then petitioner is wrongfully denied the right, in a valid legal transaction, to purchase and acquire lands from a sovereign state, and to receive from said state its patent therefor.

JURISDICTION OF THE COURT: This application for a writ of certiorari is made under section 240 of the Judicial Code (U. S. C., Title 28, Section 347.) The land involved consists of 5564.28 acres situate in Carbon County, Utah. These lands under the evidence, and in view of the various agreements entered into as they are shown by the record, are of the approximate value of $100.00 per acre, or $556,428.00. The questions of law involved are of vital importance, not only to this petitioner, but to the State of Utah and all persons acquiring title to lands by the various land grants to the State of Utah. If the decision of the Circuit Court of Appeals is sustained, then there is no security or repose in the title to a great portion of the land in the State of Utah, and the effect and purpose of the statute of 1891 has been denied its full force and effect, and titles secured thereby are in jeopardy, and the statute as interpreted in U. S. v. Winona, 165 U. S. 463, is without force and effect.

The Decree of the Circuit Court of Appeals is final. The rights of the State of Utah in and to the lands involved are cancelled and annulled, and the patent granted by the state to your petitioner was held void, and that no rights were acquired thereunder by your petitioner. As the decree stands nothing remains for determination.

STATEMENT OF FACTS.

Under and pursuant to the floating grant contained in the Enabling Act of July 16, 1894 (28 Stat. 109), the 5564.28 acres of land involved in this controversy were selected by the officers of the State of Utah, and, after a due and regular investigation by the Commissioner of the General Land Office of the United States at Washington, and with the approval of the Secretary of Interior, the titles to said lands were certified to the State of Utah between the years 1901 and 1904, and one Stanley B. Milner, and other persons associated with him, entered into a contract with the State of Utah for the purchase of said lands at the price of $1.50 per acre. Said contract of purchase was then assigned to your petitioner, a corporation in which Stanley B. Milner owned approximately all of the capital stock.

At the time of the purchase of said lands, and according to the rule then being enforced by the General Land Office of the United States, said lands were classified as nonmineral in character because there were no exposures of any coal having commercial value on any subdivision of the land selected and certified. The rule then and for many years prior thereto in force provided that "lands cannot be classified as coal lands unless commercially valuable coal is exposed on each legal subdivision of 40 acres proposed for sale." This rule had been uniformly recognized for many years in land department decisions. Nearly two years after the lands involved had been selected by the State of Utah, and title thereto in the usual manner had been certified by the government to the State of Utah, Joseph A. Taff, a government geologist, under date of September 7, 1905, called attention to this rule to W. A. Richards, then Commissioner of the General Land Office, and said:

> "To this rule the local United States Land Office and State Land Board have been and now are subject. * * *"

He then suggested that this rule prevented a proper classification of coal lands, and recommended that the rules governing their selection be changed. Replying to this communication under date of September 18, 1905, Commissioner Richards, in a letter to the Secretary of the Interior, called

attention to numerous decisions upholding the then existing rules, and among other things stated:

> "It will be seen from the decisions referred to that the department and the courts have always held that there must be an actual discovery of mineral, in some quantity at least, upon the land under investigation before it can be held to be mineral in character."

And he concluded his communication as follows:

> "Any changes in the general practice would be far reaching in its effect, and it is recommended that the detailed report treating all specific tracts of Messrs. Taff and Hare be awaited, and that when filed it be given consideration with a view to such action on the point raised as may then seem just to the government, the state, and to individual claimants." (Gov. R. 370-7)

This agitation resulted in the establishment of the doctrine of geologic inference as set forth in the case of Diamond Coal & Coke Company v. United States, 233 U. S. 236, and upon this decision the lands involved in this controversy were found to be mineral in character in 1914 (Milner v. United States, 228 Fed. 431, 248 U. S. 594).

The United States commenced an action on January 7, 1907, against the Milners and your petitioner for the cancellation of said contracts of sale, alleging that the lands were mineral in character and did not pass under the grant to the State, and that the certifications from the United States to the State of Utah had been procured by fraudulent misrepresentations, and that by reason thereof the certifications so made were void, and that the possession of the lands should be restored to the United States, and all clouds on the title of the United States be removed.

This suit was tried in January, 1910, but was not determined by the Trial Court until June, 1914, a short while after the final decision of this Court in the case of Diamond Coal & Coke Co. v. United States, 233 U. S. 236, decided April 6, 1914. The decree of the Trial Court in the Milner case decreed the United States to be the owner and entitled to the

possession of the lands involved and quieted its title against the defendants and their privies to that suit and perpetually enjoined the defendants from thereafter asserting any claim to said lands. This decree was affirmed by the Circuit Court of Appeals November 15, 1915. (228 Fed. 431) Appeal dismissed. (248 U. S. 594)

The State of Utah was not made a party to the Milner suit and could not be made a party because the Trial Court had no jurisdiction to determine the rights of the State of Utah in said litigation without its consent. It might have intervened but did not,—perhaps because the Special Assistant to the Attorney General who commenced and carried on the Milner suit, appeared before the State Land Board of the State of Utah on the day following the institution of the Milner Suit, and assured the State Land Board that the United States sought nothing further by said suit than to set aside the Milner contracts and to relieve the State from such contracts, and that if the government won the suit the title to the land would be in the State, and that the government did not seek to deprive the State of its title. (R. 245-6) No further proceedings or transactions were had with reference to said land until the year 1920, when your petitioner entered into a separate, independent and new contract with the State of Utah for the purchase of said lands, at $100.00 per acre, or the sum of $555,428.00, to be paid as follows: $100,000.00 on or before January 2, 1930; $200,000.00 on or before January 2, 1940; and $256,428.00 on or before January 2, 1950. This indebtedness was evidenced by promissory notes secured by a mortgage covering the land. All of the notes bore interest on and after January 2, 1925, at the rate of 5 per cent until maturity, and 8 per cent thereafter until paid.

Thereupon, your petitioner entered into possession of said lands, and in October, 1920, sold 1120 acres of the land in question to the Independent Coal & Coke Co., a corporation organized under the laws of the State of Wyoming, receiving therefor 365,000 shares of the capital stock of said company having a par value of $365,000.00, and an actual value of 60 cents per share, and the purchaser assumed an indebtedness of $112,000.00 standing against 1120 acres of land in favor of the State of Utah. This contract was ratified by the State of Utah.

Thereafter on May 16, 1924, the United States brought this action against your petitioner and the Independent Coal & Coke Co. The bill sought to have your petitioner and the Independent Coal & Coke Co. declared constructive trustees of the land involved, and to have the parties ordered to reconvey title to the land to the United States. The Trial Court dismissed the bill on the ground that the relief was barred by the Statute of Limitations. Upon appeal this ruling was reversed. (United States v. Carbon County Land Co., 9 Fed. (2d) 517.)

This court then granted a writ of certiorari and permitted the State of Utah to appear in support of the writ. The decision of the Eight Circuit Court of Appeals was affirmed by a divided court. (274 U. S. 640)

On the return of the mandate to this Court to the United States District Court for the District of Utah the original bill of complaint was amended. The State of Utah then intervened, pleaded and set up its mortgage.

The United States, after making unsuccessful objections to this intervention on the part of the State, then filed its answer to the complaint in intervention and also its counter-claim. In this counter-claim it claimed title to the land, and prayed, among other things, that the Court adjudge and decree that the certifications of said land "so made to the State of Utah, as hereinbefore pleaded and set out, be delivered up to be cancelled, and that the Court, by its decree, cancel and annul the same". (R. 84-5)

REPLY OF STATE: To this counter-claim, the State of Utah replied, denying in substance that the lands were of a known mineral character on May 9, 1904, or at any time prior thereto, and alleging that said lands were classified as non-mineral, and that never, at any time until the commencement of the action on January 8, 1907, had the United States pretended or claimed that said lands were of a known mineral character. Said reply re-affirmed the allegations contained in its complaint in intervention, and finally alleged that the cause of action set forth in the counter-claim of the United States was barred by virtue of the provisions of Section 8 of the Act of Congress dated March 3, 1891, which in substance provides that all actions to vacate or annul patents shall be commenced within six years after the date of the issue of such

patents. The State of Utah then prayed "that the United States take nothing by reason of said counter-claim; that said counter-claim be dismissed for want of equity, and * * * that the lands described in said counter-claim and in the complaint of the plaintiff be decreed to the State of Utah, and that the State of Utah be decreed to be the absolute owner of said lands, both legal and equitable, as against all claims of the United States" and for general relief. (R. 89)

Upon a hearing, the Trial Court entered a decree that the State of Utah is, as against the United States, the owner of the land in controversy, but decreed that the patent dated February 10, 1920, issued by the State of Utah to this petitioner, be and the same is hereby adjudged to be void and of no effect.

The Circuit Court of Appeals, by its opinion and decision, reversed the decree as against the State of Utah, holding that it should operate as a cancellation of the lien of the mortgage held by the State, or of any liens thereon, and that the title of the United States should be quieted, and that the State or anyone claiming under it should be enjoined from asserting any claim to the title or possession of the premises, and that the title held by your petitioner be impressed with a trust in favor of the United States, and that petitioner should account for the use of the lands since 1920.

SUBSTANCE OF DECISION OF COURT OF APPEALS

The holding of the Circuit Court of Appeals, in reversing the judgment of the District Court, is predicated upon the following propositions: (Opinion R. 592)

1. That the lands here involved were known mineral lands and not subject to grant by the United States.

2. That the title thereto was procured from the Government by material misrepresentations of facts.

3. That the Government attacked the proceedings by which its certifications were procured by a proceeding in a court of competent jurisdiction within six years prescribed by Section 8 of the Act of March 3, 1891.

4. That the six-year limitations prescribed by the statute is not a bar to this action as far as it seeks to impress a trust on the titles held by your petitioner and the Independent Coal & Coke Company, and that the two companies hold the legal title to these lands.

5. That the decree of the Trial Court is contrary to the decision of this Court in that it granted no relief to the Government as against your petitioner or the Independent Coal & Coke Company.

6. That because the State had parted with its title, and its interest was thereafter represented by a purchase money mortgage, then as the mortgagee therein it held under your petitioner, and that the State of Utah was a privy in title to your petitioner, and was therefore bound in equity by the decree of 1914, entered in a suit to which the State was not a party and to which it could not have been made a party without its consent.

7. That although the cross-bill of the United States against the State prays for a cancellation of the certifications made by the Government, still the primary relief sought against the State is the same as that against the Companies, viz: to impress a trust on such title as it has, in aid of the 1914 decree, and the statute therefore does not bar the action.

8. That the State has no just claim to these lands, and that the State's position in this case "is not entirely worthy of it." (Quoting Court's opinion.)

9. That the decree of 1914 does not merely set aside the contract of sale made between the State and the Milners, but prevents the Milners and their successor, your petitioner, from asserting any claim under the certifications which they have fraudulently procured. (Ignoring the fact that your petitioner is a corporation, that it did not participate in any fraud in the securing of the certifications, and then denied it the right to purchase the lands from the State of Utah years after the original contract, in a new, separate and independent transaction.)

10. That the United States is not estopped by reason of the representations of the Special Assistant Attorney General of the United States, made to the State Land Board in 1907;

that only the Congress of the United States could provide for the disposition of the lands of the United States.

11. That the United States was not guilty of laches because there was no reason for it to act until the State of Utah asserted its claim to these lands by issuing a patent.

12. That while the Milners were not guilty of actual fraud, and no moral turpitude is imputed to them, still in a legal sense the lands were fraudulently obtained, and that the decision involved in the original suit and rendered in 1914 is binding upon the Court of Appeals.

SPECIFICATION OF ERRORS.

Your petitioner assigns and specifies error as follows:

1. That the Circuit Court of Appeals erred in holding that as to the State of Utah, the land involved were known mineral lands, and erred in ignoring the fact that said lands were by the standard of law, in force at the time of the certification by the United States to the State of Utah, non-mineral in character, and erred in failing to apply the standard of law which existed at the time of the certifications were made by the United States to the State of Utah, and for the same reason erred in finding that there was a material misrepresentation of the facts as to the character of said land.

2. That the Court of Appeals erred in holding that the Government attacked the proceedings by which the certifications were procured by an action in a court of competent jurisdiction within the six years prescribed by Section 8 of the Act of March 3, 1891,—it being conceded that the attack made by the Government was merely upon the Milners and your petitioner and not upon any title held by the State of Utah.

3. That the Court erred in holding that the six-year limitation prescribed by the statute can be avoided by an action seeking to impress a trust when, as a matter of fact and law, it cannot be avoided by an action which seeks to vacate and annul a patent or a certification.

4. That the Court erred in failing to appreciate that the impressment of a constructive trust, accompanied with

a reconveyance of the title to land, is in all respects the legal equivalent of and necessarily includes the vacation and annulment of the patent, certification, or other muniment of title, and in failing to appreciate that the creation of a constructive trust by the court, as against a grantee, contains within it, as an essential prerequisite to its existence, the vacation and annulment of the grant in whatsoever form.

5. That the Court erred in failing to appreciate that the Statute of Limitations is a meritorious defense and the prime essential and basis foundation to every valid title, and that such statute was enacted for the purpose of creating a right, accompanied by its resulting repose and security, rather than for the mere purpose of barring one form of a remedy and allowing the right to be destroyed by adopting another mere form.

6. That the Court erred in failing to give effect to the interest of the State of Utah in the land involved, which interest was the entire purchase price of said land; and erred in failing to appreciate that the State of Utah was still in law seized of the land involved, to the same extent as it has been at any time since the certifications were made by the United States.

7. That the Court erred in holding that the State's rights in the land came from or were held under your petitioner, and in failing to recognize that the State's rights in said land came from the United States, under and pursuant to the Enabling Act of July 16, 1894; and erred in concluding that the State of Utah was a successor to your petitioner, and erred in failing to appreciate that the State was charged by the United States to the full extent of the acreage involved, in partial satisfaction of the grant made in said Enabling Act.

8. That the Court erred in holding that the State is "under the peculiar circumstances and under the doctrine of the Williams case, bound in equity" by the decree of 1914, when it is conceded that not only was the State not a party to the suit in which that decree was made, but that it could not have been made a party without its consent.

9. That the Court erred in failing to appreciate that the State as well as the United States is clothed with and entitled to the immunities and privileges of a sovereignty, and

that while the United States can convey its lands only by means of the rules provided by its Congress, the State of Utah can convey its lands only by means of the rules provided by its legislature, and that neither of the sovereignties can do more or less than follow its law.

10. That the Court erred in holding that the primary relief sought against the State of Utah is to impress a trust on the title to the land involved, in aid of the 1914 decree, because no trust could be nor was any imposed upon the State of Utah by the Circuit Court of Appeals.

11. That the Court erred in holding that the State has no just claim to these lands, and in intimating that the State's position "is not entirely worthy of it", because it appears from the record that these certifications made by the United States to the State have for more than twenty-five years been treated by both the State and the United States as a partial satisfaction of the grant made in the Enabling Act.

12. That the Court erred in holding that the decree of 1914 had any other or greater effect than to annul the interest of Milner and your petitioner as it existed at the time of the entry of that decree; and erred in assuming that this Court intended to hold that your petitioner could not, by means of a new, fair and lawful transaction, buy this land from the State if it was the owner thereof, or from any other person who might own said land.

13. That the Court erred in holding that the United States was not estopped by reason of the representations of the Special Assistant Attorney General who was conducting the Milner suit in behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit; that now to claim that the State is concluded by the decree entered in the Milner suit permits the United States to reap an unjust advantage from the misconduct of its representative.

14. That the Court erred in holding that the United States was not guilty of laches, because, regardless of its legal effect and legal consequence, the conduct of the United States in suffering the long delay before commencing its action of 1924 was from any standpoint inexcusable and highly detrimental to both the State and to every citizen thereof.

This question might well have been settled years ago had the United States assumed a different attitude.

15. That the Court erred in applying to the conduct of the Milners between the years 1901 and 1904, which was in accord with the then existing legal standards, another legal standard not created or conceived until 1914, and by this error in effect, through a retroactive application of the new standard, transformed an honest act into a fradulent one.

16. That the court erred in failing to apply the six year Statute of Limitations prescribed by Section 8 of the Act of March 3, 1891, in favor of the State of Utah, thereby denying to the State title to the lands involved.

17. That the court erred in refusing to recognize that the legal title to the lands involved vested in the State of Utah after the issuance of the certifications, the Government never at any time having denied or questioned that the State held such legal title.

18. The court erred in failing to recognize the legal title to the lands involved in the State of Utah, and by so doing sought to vest the Government with authority to control the rights of a sovereign state in its private dealings and transactions with individuals or corporations, and in violation of Article 10 of the Amendments to the Constitution of the United States, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people".

19. The court erred in refusing to set aside that portion of the judgment of the Trial Court wherein it was decreed that "the State patent dated February 10, 1920, issued by the State of Utah to this petitioner, be and the same is adjudged to be void and of no effect", thereby violating the constitutional rights of your petitioner to purchase and acquire the land in question in a lawful, valid and legal transaction.

REASONS FOR ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits that the present case is one in which this Court should issue a writ of certiorari for the following reasons:

1. That the rights of this petitioner are inseparably connected with the rights of the State of Utah, and should be considered in connection therewith.

2. In this case the United States appealed from the judgment in favor of the State of Utah, and your petitioner appealed from the judgment decreeing that the patent issued to it by the State of Utah be adjudged void and of no effect. These appeals were heard, considered together, and one opinion rendered January 14, 1931, determining all of the questions involved. To secure a full and complete review of such issues justifies the issuance of the writ prayed for.

3. There is a real controversy between the State of Utah and the United States. This controversy, however, directly involves the rights of this petitioner, as it deraigns its title to the lands in question from the State of Utah. Because of the sovereign character of the State of Utah and of the United States, and because of the provisions of the Constitution providing for the original jurisdiction of this court in suits where the State is a party, such controversy should not be determined without a review by this Court. No other Court than this Court could acquire jurisdiction of a controversy between the United States and the State of Utah without the consent of each of said parties. That consent has been given by the United States bringing this suit, and by the State voluntarily intervening therein, and particularly by the United States filing its counter-claim against the State, and the State replying thereto. Considering, therefore, only the character of these two parties, it is submitted that the judgment complained of should be reviewed, and in this review the rights of your petitioner must of necessity be considered.

4. But, disregarding the character of the parties, and looking only to the character of the questions involved, the great and transcendent public importance of the decision of the Circuit Court of Appeals, it is submitted, compels a review by this Court because the decision of said Court makes uncertain and insecure the titles to real estate, especially within the State of Utah and throughout all the public land states. All titles rest more or less upon a repose resulting from the Statute of Limitations, and when once it is held that Section 8 of the Act of March 3, 1891, can be avoided by an action seeking to establish an implied or constructive trust as contradistinguished from an action for formal annulment of a

patent, then the purpose of that statute has failed, or has ceased to operate, and the title to land has become insecure and its acquisition fraught with great danger. This is fully illustrated in this case, wherein this petitioner in good faith entered into a new, separate, independent contract, obligating itself to pay the State of Utah $556,428 with interest, and thereafter sold to the Independent Coal & Coke Company, an innocent purchaser, 1120 acres of the land involved, receiving therefor 365,000 shares of its capital stock of the par value of $1.00, and the Company assuming a debt to the State of Utah of $112,000.00.

5. The decision of the Court of Appeals, holding that the State of Utah is bound by the decree entered in favor of the United States and against your petitioner, et al., in the year 1914, is in conflict with the decisions of this Court and in conflict with the general law, because the State was not a party to the suit which resulted in said decree, and because the State could not have been made a party to such suit without its consent.

Wood v. Davis, 7 Cranch, 271, 3 L. Ed. 339;
Brandon v. Ard, 211 U. S. 11, 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229;
Tindal v. Wesley, 167 U. S. 204; 42 L. Ed. 137;
Carr v. United States, 98 U. S. 433; 25 L. Ed. 209;
Cadwallader v. Harris, 76 Ill. 370;
State v. Cincinnati Tin Co., 66 Ohio St. 182, 64 N. E. 68.

These cases hold in substance that the record in the Milner suit does not estop the State and will not be evidence against it for any purpose touching the merits of its claim. The State, not being estopped by the Milner suit, and possessing from the date of the issuance of the certifications the legal title to the lands, this petitioner cannot lawfully be deprived of purchasing in good faith for a valuable consideration, property from the legal holder. The decision, however, deprives petitioner of this right, and virtually outlaws it from engaging in legitimate business.

6. The decision of the Court of Appeals, in holding that Section 8 of the Act of March 3, 1891, does not apply in favor

of the State because the suit is one to have the land impressed with a constructive trust, or because it is in aid of a former decree, is untenable and in conflict with the great weight of authority, and in conflict with the applicable decisions of this Court, and in conflict with the general law, because this Statute of Limitations gives a right meritorious in character, and its application does not depend upon the character of the remedy adopted or the nature of the forum chosen, and the rights created by it cannot be sacrificed to any mere form of remedy selected by the complainant.

United States v. Whited, 246 U. S. 552, 62 L. Ed. 879;
United States v. Winona, 165 U. S. 463, 41 L. Ed. 789;
United States v. Oregon Lumber Co., 260 U. S. 290, 67 L. Ed. 261;
United States v. Chandler-Dunbar Co., 209 U. S. 447, 52 L. Ed. 881;
Robison v. Hook, 4 Mason, 139, 20 Fed. Cas. 1017 (1826).

(Opinion of Justice Story: Statute of Limitations bar against constructive trusts.)

Elmendorf v. Taylor, 10 Wheat. 152, 6 L. Ed. 289;
Kane v. Bloodgood, 7 Johnson's Chancery 90, 11 Am. Dec. 417;

(Opinion by Justice Kent.)

New v. Smith, 86 Kan. 1, 119 Pac. 380.

(Substance and not form of action decisive in the application of a statute.)

Campbell v. Dick, 157 Pac. 1062 (Okla.);
Newson v. Board, 103 Ind. 526, 3 N. E. 163;
Speidel v. Henrici, 120 U. S. 377, 30 L. Ed. 718;
Carroll v. Green, 92 U. S. 509, 23 L. Ed. 738.

These authorities, it is believed, establish the proposition that a statute of limitations, although in form barring a

remedy, in substance creates a right, the existence of which cannot be avoided by choosing one form of a remedy as contradistinguished from another. The application of the bar created by the statute is not prevented by the fact, if it be a fact, that the proceeding is in aid of a former decree, where such proceeding brings in a new party.

Davey v. Dodge, 213 Fed. 722 (8th C. C. A.)

(It is difficult to see how there can be an affirmation of the certifications if such affirmation is immediately followed with the creation of a constructive trust, accompanied by an order for reconveyance. (See opinion of Circuit Judge Carland in Davey v. Dodge, 213 Fed. 729.)

7. It is apparent from the opinion of the Circuit Court of Appeals rendered in this case, and the opinion rendered by the same Circuit Court of Appeals in the case of United States v. Amalgamated Sugar Company, decided March 5, 1931, that said Circuit Court of Appeals was in grave doubt or, to quote from one of the opinions, "had serious misgivings" about the determination of the question of law as to the application of Section 8 of the Act of March 3, 1891, and that "if this statute is to serve the purpose for which it was passed, it would seem that it should not be circumvented by asking for the same relief in a different form of action". (Quoting from Circuit Judge McDermott's opinion in the Amalgamated case.)

8. The decision of the Circuit Court of Appeals has misinterpreted the action as between the State of Utah and the United States, in holding that the suit as between said parties was in aid of a former decree, because it is apparent from the Counter-claim of the United States (R. 68) and the reply of the State (R. 87-89) that as between such parties the controversy is one of an original character to cancel the certifications made by the United States to the State of Utah pursuant to the Enabling Act. The ownership of these certifications and of the title conveyed by them was vested in the State of Utah at the time of the Milner suit, and for many years after the date of the decree in that suit, and could not have been adjudged or determined in such suit, because the State of Utah was not a party thereto. To reach that subject required an original suit, as contradistinguished from

one of an ancillary character. The counter-claim of the United States and the reply of the State constitutes an original suit.

9. It is apparent from the opinion of the Court in the case at bar, and especially from the opinion in the case of United States v. Amalgamated Sugar Company, decided by the Circuit Court of Appeals of the Tenth Circuit on March 5, 1931, that said Circuit Court of Appeals, in holding that the Statute of Limitations did not apply because the suit was one to impress the land involved with a constructive trust, erroneously relied upon two decisions of this Court: Lockhart v. Leeds, 195 U. S. 427; United States v. New Orleans Pacific Ry., 248 U. S. 507, when neither of such cases can by any possibility affect the question being presented. Where the Government brings a suit to protect the rights of third parties, of course the statute does not apply.

10. It is believed that the decree of the Circuit Court of Appeals ignores the general rule of law conceded everywhere, that in the absence of statute to the contrary, a purchase money mortgage has priority over a previously docketed judgment against the mortgagor, and when the Circuit Court of Appeals subordinated the State's mortgage to the judgment and decree rendered against your petitioner, in 1914, it failed to appreciate that the legal and practical effect of the transaction between the State and your petitioner was to convey to the latter company an equity of redemption only, and leave the title to the land in the State. (41 C. J., pages 458 and 528, Sections 352 and 470 of Mortgages.)

11. It appears that the certifications were not tainted with any fraud at the time they were made, and that, according to the then existing standards, their validity was beyond attack. It is believed that the Circuit Court of Appeals, by its decree, has, in violation of fundamental principles generally accepted, transformed an act, honest when done, into a fraudulent one, by a retroactive application of a technical rule first declared by this court long after the date of said certifications.

12. The original applications to select the lands involved and the contracts to purchase them were entered into between the years 1901 and 1904. The alleged fraudulent applicants

are long since deceased. These contracts were transferred to your petitioner, and were subsequently declared fraudulent and cancelled. Petitioner, more than six years thereafter, finding that the State of Utah claimed and was in possession of these lands, entered into a new, and independent, contract to purchase them and received a State patent therefor. Four years thereafter the Government, (wrongfully assuming that this purchase was under the original contracts to which your petitioner was not a party), sought by the present suit to impress a trust in favor of the United States upon said lands, and to thereby, deprive your petitioner of the lawful benefits of its contract, and to at the same time deprive the State of Utah of its purchase price,—this in clear violation of fundamental principles of law and the decisions of this Honorable Court cited above.

13. The decision rendered in the original Milner suit cancelled the first contracts of purchase from the State of Utah. This petitioner acquired no rights or benefits by reason of those contracts. For the Circuit Court of Appeals, to now hold that because these original contracts were cancelled your petitioner was forever outlawed and deprived of the right to at any time thereafter, by a new independent contract, free from fraud, purchase said lands from the legal holder, is a proposition to which we cannot subscribe. It is in conflict with the general law, and in violation of the decisions of this Court. The decree of which a review is sought is such an extraordinary departure from the usual course of judicial proceedings that the writ prayed for should be granted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court, on a day designated for its review and determination, a full and complete transcript of the record and all proceedings in the United States Circuit Court of Appeals had in said cause entitled "Carbon County Land Company, appellant, v. the United States of America, Independent Coal & Coke Company, a corporation, and the State of Utah, Intervenor, Appellees, No. 253", to the end that said cause may be reviewed and determined by this Court as provided by law, and that said judgment of the

United States Circuit Court of Appeals for the Tenth Circuit herein may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

CARBON COUNTY LAND COMPANY,
a corporation,

By SAMUEL A. KING,

Attorney for Carbon County Land Company.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The United States appealed from the decree of the District Court of the United States for the District of Utah, to the Circuit Court of Appeals of the Tenth Circuit (Case No. 248). From the same decree your petitioner, Carbon County Land Company, also appealed (Case No. 253). These appeals were heard and considered together, and the Court of Appeals, on January 14, 1931, rendered one decision disposing of both appeals. From the opinion rendered the State of Utah has filed its petition for a writ of certiorari, together with its supporting brief. The Independent Coal & Coke Company joined in the petition filed by the State of Utah, and requested that the same be granted. The same fundamental questions being involved in the two appeals, and the decision of the Circuit Court of Appeals being adverse to the State of Utah and to your petitioner, Carbon County Land Company, the latter, heretofore filed in this Court its statement joining in the petition of the State of Utah, and requested that the same be granted as prayed for.

In addition to the request filed on behalf of the State of Utah, your petitioner now presents its independent petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit.

An examination of the two petitions will conclusively demonstrate that the same fundamental questions are involved in each petition, and that the brief and argument in support of the petition filed by the State of Utah apply with equal force and effect in support of the petition filed by your petitioner, Carbon County Land Company.

PETITIONER ADOPTS THE BRIEF AND ARGUMENT FILED ON BEHALF OF THE STATE OF UTAH.

Petitioner, in order to avoid encumbering the record, and for the reasons stated above, does now hereby adopt the brief and argument filed by the State of Utah in support of its petition for a writ of certiorari, and respectfully requests that the statement, specification of errors, arguments, and

cases cited, beginning on page 17 to and including page 36 of said brief and argument, may be considered as filed and presented by your petitioner, Carbon County Land Company, and given full and proper application in support of the petition filed.

THE GOVERNMENT CERTIFICATIONS VESTED THE LEGAL TITLE IN THE STATE OF UTAH.

The original Milner suit was not brought to divest the State of Utah of its title. This was the interpretation placed on the bill by Mr. Maynard, Special Assistant to the Attorney General, who commenced and conducted the action. He stated to the State Land Board at the time of the filing of the suit, that "the State of Utah has purposely not been made a party to this bill. * * * The only relief we ask is that you be relieved from your contract entered into with the Milners. *That the legal title to the land is in you now, and if the Government is successful will be in the State of Utah. We do not seek to deprive you of these lands.* * * * *The legal title remains in the State.*" (R. 47-8)

The first suit was filed January 7, 1907. After the case was tried the Trial Court withheld its decision four and one-half years until after the decision was rendered in the Diamond Coal & Coke Company case, and then on January 9, 1914, the decree was filed. This decree was later affirmed by the Circuit Court of Appeals for the Eighth Circuit, November 15, 1915. During the pendency of this action no attempt was made by the Government to assert title to the land as against the State of Utah. After the decree was affirmed no claim was made or asserted that the Government possessed either the legal or equitable title, until after the filing of this action on May 16, 1924.

Plaintiff's amended bill admitted that the legal title still remained in the State. Its answer to the petition in intervention filed by the State admits this fact. It was never claimed that the legal title has not rested in the State of Utah since the certifications were made. It is admitted that the Government never at any time asked the State to cancel these certifications until it filed its answer to the complaint in intervention February 6, 1929, more than 25 years after the last certification was made, and 22 years after the Assistant

to the Attorney General stated, "that we (United States) do not seek to deprive you of these lands." (R. 47)

Legal title to these lands was transferred to the State of Utah by certifications having the same effect as Government patents. No fraud was at any time charged against the State or its officials in securing these certifications.

After the first Milner decision, no change was made upon the Government books, maps, or plats, evidencing ownership in the Government. The Government officials possessed full knowledge that legal title to these lands rested in the State. The State possessing this knowledge, and knowing that the Statute of Limitations had run in its behalf, and that under numerous decisions of this Court its title was secure, sold these lands and executed its patent therefor.

If the Statute of Limitations and the decisions of this Court rendered construing it are to be given any effect, then the State on February 10, 1920, had a good title to convey, and if it did, can it then be said that there were any facts present which would have the effect of transforming the perfect title in the State into a bad title, or a title in trust in its grantee?

PURPOSE OF STATUTE OF LIMITATIONS.

"The effect of the statute was to make good the title conveyed by the United States."

United States v. Chandler-Dunbar Water Co., 209 U. S. 447;
United States v. Whited & Wheless, 246 U. S. 542-563.

The decree in the first Milner suit did not affect the title of the State as the State was not a party to that action. It did not deprive the State of such title as it then had, and that title was such that it ripened into a good title by the operation of the Statute of Limitations, regardless of the character of the land and the means by which the State procured the title.

Stockley v. United States, 260 U. S. 532-543.

At any time within six years from the date of the certifications issued to the State, the United States could have brought suit to annul the certifications and to regain title.

Burke v. S. P. Ry. Co., 234 U. S. 669-692-3.

Not having seen fit to do this, the certifications, after the lapse of the statutory period, became conclusive. That is the very object of the statute.

Cramer v. United States, 261 U. S. 219-233-4;
Winona & St. Peter R. Co. v. United States, 165 U. S. 463.

In the Winona case, speaking of this Statute of Limitations, the court said:

> "'That when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should after the lapse of the prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities or improper action of its officers therein."

It was further stated:

> "Under the benign influence of this statute, it would matter not what the mistake or error of the land department was, what the fraud and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, providing only that the land was public land of the United States and open to sale and conveyance through the Land Department."

The purpose of this Statute of Limitations was said by this Court in United States v. Whited & Wheless, supra, to be, "to promote prompt action for annulling patents where cause therefor was believed to exist, and to make titles resting upon patents dependably secure when the period of limitations should expire", it was "that patent title might be made secure." (652-3)

And in Cramer v. United States, supra, the Court said that the object of the statute was "to extinguish any right the Government might have in the lands."

It is true that the statute does not expressly refer to suits to annul titles other than titles conveyed by patent, but titles conveyed by certification are clearly within the intent and purpose of the Act. (United States v. Whited & Wheless, supra.)

Under the well established practice of the Land Department, lands selected by a state are conveyed to the state, not by patent, but by certification, and as shown above, such certification is equivalent to a patent.

It was said by this Court in Shaw v. Kellogg, 170 U. S. 312, 351, that

> " • • • The significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word patent, or in the instrument which the word defines. By it the legal title passes, and when by whatsoever instrument, and in whatsoever manner that is accomplished, the same result follows as though a formal patent were issued."

The Government's remedies are clearly set forth by Mr. Justice Clark in Whited v. Wheless, supra, where he says that,

> "When patent has been issued through mistake or inadvertence, or has been patented by fraud, the Government has the right to bring one or two causes of action—one to cancel and annul the patent or certification, if issued by mistake or inadvertence, and this must be brought within the period of limitation fixed by the Act of 1891, or within the period fixed by the Act if the action is for fraud in patenting the title, or within the same period after discovery of such fraud; or it may bring an action to recover the value of such lands, provided it has not made such an election as is mentioned in the case of the United States v. Oregon Lumber Company, 260 U. S. 290."

In this case the Government did not pursue either of these remedies.

CERTIFICATIONS NOT FRAUDULENT.

As stated in the brief filed on behalf of the State of Utah:

> "The certifications obtained by the State from the United States were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the lands involved are non-mineral in character. It became mineral in character only by reason of the change in the law made 10 years after said certifications. The standard existing at the time the certifications were made should have been applied."

The Court in determining the conduct of the Milners between the years 1901 and 1904, did not apply to their conduct the existing legal standards then in existence, but applied another legal standard not created or conceived until 1914, and by so doing, through a retroactive application of the new standard, transformed an honest act into a fraudulent one.

The opinion rendered by the Circuit Court of Appeals states that

> "there was no exposure of commercially valuable coal on any subdivision of the land selected," and until the decision in the Diamond Coal & Coke case,
>
> "many lawyers and some courts believed that such an exposure was an essential to the listing of lands as mineral. The rule promulgated by the Commissioner of the General Land Office and decisions of the Land Office were to that effect."

It was under the rule promulgated by the Commissioner of the General Land Office and the numerous land decisions that the Milners selected the land in question. They were acting honestly in obtaining the lands by the only method at that time open to them under the law. And this rule was not changed until the decision rendered in the Diamond Coal & Coke case in April, 1914, and then a retroactive application of the new rule made that which was honest at the time of its commission fraudulent ten years later.

In discussing changes of this character, Circuit Judge Sanborn, in the case of Clancey v. Barker, 131 Fed. 161 (8th Circuit, 1904), at page 171, uses this language:

> "A retroactive decision which makes and applies a new rule of law, and attaches another and unforseen liability to a contract after its execution, is as vicious as an ex post facto statute."

THE GOVERNMENT SEEKS TO BASE ITS RIGHT OF RECOVERY AGAINST PETITIONER BY REASON OF THE INJUNCTIVE RELIEF GRANTED IN THE ORIGINAL ACTION.

In the 1907 suit the Government only prayed for the cancellation of the contracts entered into by the Milners with the State of Utah, and for general relief (Gov. T. of R. 201). There was no prayer for injunctive relief, or any demand to quiet the Government's title in the land as against the defendants. The decree rendered, however, makes no reference to the cancellation of the contract, but decrees that the Government is the owner and entitled to the possession of the land, and enjoins petitioner from making any claim to the premises. (R. 3). This decree was unauthorized, and violates the well established principle of pleading and the law applicable thereto. Upon this decree, rendered not in keeping with the issues in that case or the prayer of the bill, the Government now claims that petitioner is perpetually enjoined from acquiring any title to the lands involved. We insist that the decree was void in this respect, and furnishes no authority for the Government's contention.

> "Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than it is required, it will be limited by construction so that its effect shall be such, and such only, as it needed for the purposes of the case that has been made."

Barnes, Trustee v. Chicago M. & P. R. Co., 122 U. S. 1;
Reynolds et al. v. Stockton, Receiver, 140 U. S. 254;
Clark v. Arizona Ass'n., 217 Fed. 640;
Cushman et al. v. Warren Paving Co., 220 Fed. 857.

The prayer for relief is an essential part of the bill in equity, and relief not affirmatively sought will not be granted. The relief granted must conform to the prayer whereby the party indicates to the court the relief which he demands upon his allegations.

> "It is often stated generally as an established doctrine that under the general prayer, relief inconsistent with that asked for by the special prayer cannot be granted."

21 C. J. 683 (Cases under note 79);

Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. at page 934;

Boone et al. v. Chiles et al., 10 Pet. 177, 9 L. Ed. 388;

Hayward v. Elliott Nat'l Bank, 90 U. S. 611, 24 L. Ed. 855;

English v. Foxall, 2 Pet. 595, 7 L. Ed. 531.

Story in discussing the extent to which an injunction will be granted under the general prayer, states:

> "Thus for example an injunction will not ordinarily be granted under a prayer for general relief; but it must be expressly prayed."

Story Eq. Pl. 9th Ed., Sec. 41, p. 35.

The granting of injunctive relief in the original bill was not prayed for. At that time petitioner did not own the land involved. It had merely a contract for purchase. This contract was declared fraudulent. No rights were ever acquired under it. Petitioner did not enter into the original contract, but became merely the assignee of it. Years thereafter in a new separate and independent contract it purchased these lands from the then legal holder. To now say that by virtue of the original decree petitioner was forever outlawed in respect to the acquiring of these lands in a legal and lawful manner, we insist was violative of petitioner's legal rights.

CONCLUSION.

Petitioner, feeling that its rights under the law have not been fully or properly considered and adjudicated, now submits this petition for the writ, and earnestly urges that it be granted as prayed for.

Respectfully submitted,

SAMUEL A. KING,

Attorney for Carbon County Land Company.

FILE COPY

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CHARLES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 48

CARBON COUNTY LAND COMPANY,
a corporation,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE CARBON COUNTY LAND COMPANY, PETITIONER.

SAMUEL A. KING,
Attorney for Carbon County Land Company.

PARNELL BLACK,
Of Counsel.

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Utah Land Board Act 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 48

CARBON COUNTY LAND COMPANY,
a corporation,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR THE CARBON COUNTY LAND COMPANY, PETITIONER.

STIPULATION.

It was stipulated by Petitioner and Respondent that the printing of the record from the Tenth Circuit Court of Appeals be waived, and that this cause be heard, argued and considered upon the printed record in the case of State of Utah, Petitioner vs. United States of America, Respondent, No. 42, which record contains all pleadings, facts and proceedings necessary for the determination of this action, and that the stipulation be printed and included in the record. (R. 630-631)

JURISDICTION.

The decree of the Circuit Court of Appeals was entered January 14, 1931. (R. 626) Petition for writ of certiorari was granted May 18, 1931 (R. 630) pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (U. S. C. Title 28, Sec. 347)

HISTORY OF THE LITIGATION.

The Utah Enabling Act was passed July 16, 1894 (28 Stat. 107), and Utah was admitted into the Union January 4, 1896. By this Act a large acreage of land was granted the state for educational and other purposes. Section 13, provides,

> "That all land granted in quantity or as indemnity by this Act shall be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States within the limits of the State of Utah."

To secure these lands from the government, the legislature of Utah in 1896 created a "State Land Board", and gave to it the direction, control and management of the granted lands. (Laws of Utah, 1896, C. 80) Selections were thereafter made upon applications from proposed purchasers. These selections were made upon forms provided by the government and certified to the land department officials in accordance with its then rules and regulations. Acting in conformity therewith and the laws applicable thereto, Stanley B. Milner for himself and as agent for Truth A. Milner, and Harley O. Milner, and Samuel H. Gilson in person, between September 10, 1900, and September 14, 1903, made application to the State Land Board to select 5564.28 acres the land involved, and entered into agreements to purchase them from the State as agricultural lands, for $1.50 an acre. These selections were approved and certified to the State of Utah by the Secretary of the Interior prior to December 1, 1904.

FIRST SUIT.

January 7, 1907, the government filed its original bill against Truth A. Milner, executrix of the estate of Stanley B. Milner, deceased, Truth A. Milner, Harley O. Milner, Samuel H. Gilson, Carbon County Land Company, a corporation, and Peter M. Campbell. (R. 175)

September 26, 1907, a second amended bill against all of the defendants except Harley O. Milner was filed. (R. 195)

This cause was tried during January, 1910, and taken under advisement until January 8, 1914, when a decree was rendered in favor of the government.

Defendants thereupon appealed to the Circuit Court of Appeals for the Eighth Circuit, and on November 15, 1915, the decree was affirmed. (228 Fed. 431)

The appeal to the Supreme Court of the United States was dismissed for want to prosecution. (248 U. S. 594)

No further proceedings were taken in respect to these lands until January 2, 1920, when the State of Utah entered into a new and independent contract with the Carbon County Land Company whereby the State agreed to sell and the company to buy 5564.28 acres at $100.00 per acre. The company executed and delivered to the State three promissory notes, one for $100,000.00 due January 2, 1930, one for $200,000.00 due January 2, 1940, and one for $215,428.00 due January 2, 1950, each bearing interest at five per cent per annum after January 2, 1925, and then executed its mortgage thereon to secure the purchase price. The State in fulfillment of its agreement, on February 10, 1920, executed and delivered its patent. (R. 41-573, 575)

Petitioner immediately entered into the possession of the lands, and thereafter on the 16th of October, 1920, sold to the Independent Coal & Coke Company 1120 acres.

SECOND OR PRESENT SUIT.

On May 16, 1924, respondent filed an original bill in equity against the Carbon County Land Company, the Independent Coal & Coke Company, and Carbon County. Defendants moved to dismiss the bill claiming that the relief demanded was barred by the provisions of Section 8 of the Act of March 3, 1891.

January 12, 1925 an order issued sustaining the motion and a decree was entered dismissing the bill. (Original Tr. 24)

From this decree respondent appealed to the Circuit Court of Appeals for the Eighth Circuit. February 21, 1925, that Court rendered its decree reversing the judgment of the District Court. (9 Fed. (2d) 517)

Defendants then applied to this Court for a writ of certiorari.

Prior to the application for this writ the State of Utah had not participated in or been a party to any of the legal proceedings which had taken place. The State, however, by its Attorney General, petitioned this Court for permission to file a brief in support of the petitions for the writ of certiorari. This request was granted and the petitions allowed March 26, 1926. (270 U. S. 639)

On May 31, 1927, this Honorable Court by a divided opinion sustained the Circuit Court of Appeals for the Eighth Circuit, and the cause was remanded for further proceedings. (274 U. S. 640)

On December 9, 1927, the United States, acting upon the suggestion of this court, filed its amended bill. Answers were filed by this petitioner and the Independent Coal & Coke Company. By leave of court the State of Utah filed, on October 22, 1928, its complaint in intervention. Objections were interposed by the government to this application, and overruled November 26, 1928. On February 6, 1929, the United States filed its answer and counterclaim to the complaint in intervention. (R. 70) To this counterclaim Utah filed its reply on March 6, 1929, alleging, among other things, that the action was barred by virtue of the provisions of Section 8 of the Act of March 3, 1891. (R. 93-4-5)

THE DISTRICT COURT rendered judgment June 11, 1929, decreeing the lands to the State of Utah, but denied Petitioner the right to purchase it from the State and provided subdivision 3, as follows:

> "And it is further ordered, adjudged and decreed that the state patent dated February 10, 1920 issued by the State of Utah to the Carbon County Land Company, be and the same is hereby adjudged to be void and of no effect." (R. 97-98)

Appeals were thereupon prosecuted to the CIRCUIT COURT OF APPEALS of the Tenth Circuit, by the United States and by petitioner Carbon County Land Company.

That Court on January 14, 1931, reversed in part the decree of the District Court and awarded the land to the United States, but affirmed the decree against petitioner, Carbon County Land Company. (R. 611-625). (Decree, R.

626, Mandate R. 627) (46 Fed. (2d) 980). From this decision upon the petitions of the State of Utah and your petitioner, certiorari was allowed.

For the first time the rights of the Carbon County Land Company and of the State of Utah under the issues finally joined are now before this Honorable Court for its consideration.

STATEMENT OF FACTS.

To correctly determine the questions involved it is necessary to know the circumstances and conditions under which title to the lands passed to the State of Utah.

Long prior to the passage of the Enabling Act, supra, the acquisition of coal lands had been the subject of special congressional legislation, with restrictions as to the persons who were entitled to purchase, and the quantity of land which might be purchased. (Rev. Stat. Secs. 2347-8-9, and 2350) Section 2351 then provides that:

> "The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections."

In fulfillment of this provision, the Commissioner issued these rules and regulations. They were known and recognized by the public, and upheld by the Federal courts. Only vacant, unoccupied, surveyed legal subdivisions could be entered. The acreage subject to entry was limited. Only citizens over the age of twenty-one years, or an association, could enter. The land office was required to survey the land, furnish schedules and maps showing lands known to lie without ascertained coal areas, and those known to contain workable deposits of coal. Prices were fixed according to the distance from a completed railroad. The entryman was required to subscribe to an affidavit containing the following:

> "That I am well acquainted with the character of said described lands, and with each and every legal subdivision thereof; that my knowledge of said lands is such as to enable me to testify understandingly with regard thereto; that said lands contain workable coal."

In 1901 a special rule, had long been in force, which provided that,

> "Lands cannot be classified as coal lands unless commercially valuable coal is exposed on each legal subdivision of forty acres proposed for sale."

This rule was in conformity with and upheld by numerous land decisions (Letter of Commissioner W. A. Richards to the Secretary of the Interior, dated September 18, 1905. R. 387). Proof of the mineral character of the land it was held must be by actual production of mineral thereon, not that adjoining lands are of that character, nor that the land may thereafter develop mineral. (Commissioner of Kings County v. Alexander, 5 L. D. 126).

Again, mere proximity of tracts containing coal does not stamp the land upon which no coal has been found as coal land (Scott v. Sheldon, 15 L. D. 361). And the fact that land lies in a mineral belt, and that neighboring tracts contain mineral, does not show the land to be of that character. (Warren v. State of Colorado, 14 L. D. 681; In re John W. Williams, 11 L. D. 46). This doctrine was upheld by Departmental Decision March 3, 1905, where it was held that adjoining lands containing coal did not constitute the lands in controversy to be mineral land, there being no discovery of oil thereon. (San Fernando Oil Co. v. Brady).

And to the same effect there is a like departmental decision in the case of Murphy v. Ford, June 23, 1905. These rules, regulations and decisions had been followed uniformly for many years prior to 1904, by the public, the government land officials, and from 1896, by the Utah State Land Board. There was not even an attempted departure therefrom until after the suggestions contained in Commissioner Richards' communication, supra, which was from one to four years after the coal selections here involved were made.

Under these rules and decisions Utah began the selections of the lands granted to it. Only such lands as had been by the government surveyed, and maps and plats thereof filed in the United States Land Office as non-mineral were open for selection. Thousands of acres were selected, examined, surveyed by the Land Department, and purchased by numerous individuals under these grants between the years 1896 and

1907 without question or protest from the government. These lands were not known mineral lands at the date of these grants, nor at the time of the governmental survey.

The Register and Receiver of the Salt Lake Land office certified the lists of land selected by the State to the General Land Office under affidavits setting forth that:

> "We have tested the accuracy of said lists by plats and records in the office, and we find the same to be correct; and we further testify that the filing of said list has been allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and that the same are not, nor any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands." (R. 307)

Two years after these selections were approved and certified by the Commissioner of the General Land Office, and on January 7, 1907, the government filed its bill of complaint against these applicants and their assignee, the Carbon County Land Office and on September 26, 1907, filed its second amended bill alleging in substance that the applications for selection and the contracts for their purchase were fraudulent, and had been made as a part of a scheme of fraudulently obtaining coal lands. (R. 175-195)

The amended bill excludes Harley O. Milner as one of the defendants. The only judgment prayed by the government was:

(1) That it be decreed that neither the Milners, Gilson, or the Carbon County Land Company acquired any right, title or interest to said land by reason of the contracts made between them and the state of Utah.

(2) That it be decreed that the contracts are void, and that each be surrendered for cancellation.

(3) That the Carbon County Land Company acquire no title or interest in said lands by reason of the assignments of said contracts.

(4) That said parties be directed by proper decree to surrender to the State of Utah for cancellation the contracts referred to in the amended bill.

(5) That one Campbell who held a mortgage on the lands from the company be decreed to have no lien thereon.

(6) That the claimant have such further relief in the premises as may be agreeable to equity and good conscience. (R. 215).

This was not a suit to quiet title in the government, to determine its ownership in the lands, or to cancel its certifications, but was one brought expressly to cancel the contracts made by the applicants with the State of Utah. That this was the purpose of the suit, and the interpretation placed upon the amended bill, is conclusively shown by the fact that on January 8th, 1907, the day following the filing of the original bill F. E. Maynard, Special Assistant to the Attorney General of the United States, appeared before the Land Commissioners of Utah for the purpose of officially informing the Board that the Attorney General had filed a bill in the federal court. He served a copy on the Land Board and asked to have it made a part of its files, and then said:

> "That the State of Utah has *purposely* not been made a party to the bill."

He then read the latter part of the bill, and stated:

> "You will see that the only relief we ask is that you be relieved of your contracts that you entered into with the Milners; that the legal title to the land is in you now, and if the government is successful, will be in the State of Utah. *We do not seek to deprive you of these lands,* but we do seek to prevent these valuable lands from being acquired by private parties, and we desire to relieve the State from the frauds perpetrated upon it."

A representative of the applicants stated that they would not ask for a patent to issue until the terms of the contract had been complied with, and Mr. Maynard replied "that he was willing to let the matter stand until the courts adjudicated the question that is satisfactory to the government. If we are not right in our contention they are entitled to the land. *The legal title remains in the state.*" The State Board then adopted a resolution that final payments for the land would not be accepted until the rights of the applicants

to demand patent shall have been determined by the court. (R. 263-266).

DECREE.

The cause was tried during January, 1910, and taken under advisement, but the decision was not rendered until January 8, 1914, four years after it had been submitted. And while adverse to the defendants, was not in accordance with the prayer of the complaint. It decreed—

(a) That the plaintiff is the owner and entitled to the possession of all the lands involved.

(b) That plaintiff's title be quieted thereto as against all claims of defendants, or any persons to thereafter claim under them.

(c) That the defendants have no right, title, interest or right of possession in the lands.

(d) That defendants be perpetually restrained and enjoined from setting up or making any claim to said lands.

(e) That the plaintiff is decreed to be the true and lawful owner of the land, and its title quieted as against all claims, demands and pretenses of the defendant. (R. 3).

There is not in the decree the slightest reference to the contracts involved, or that they be surrend[redacted] or cancelled. It was not decreed that the plaintiff in ente[redacted] into the contracts perpetrated any fraud upon the State of Utah, or the government. The State of Utah was not even mentioned. The decree granted injunctive relief which was not prayed for, and determined questions not involved.

TAFF REPORT.

The bringing of the Milner suit was undoubtedly the result of an investigation made by Joseph A. Taff and his report to the Director of the Geological Survey, and referred to in the letter of Commissioner Richards, supra, to the Secretary of the Interior under date of September 18, 1905. (R. 387) This letter recognized the then existing rules and regulations

under which lands had heretofore been classified and selected. He stated that:

> "The purpose of this letter is to secure a modification of the rule 'that lands cannot be classified as coal lands unless commercially valuable coal is exposed in each legal subdivision of 40 acres proposed for selection', and to this ruling the local United States land office and the State Land Board have been and now are subject."

Again he states, after quoting certain land decisions, that,

> "Selections do not become effective until approved by the Secretary of the Interior, and if at any time before he approves a selection it is determined that the lands contained therein, or any part of them, are mineral in character, they are not subject to selection under the law, and it becomes his duty to cancel the selection, in whole or in part, as the facts may warrant."

There was no suggestion that proceedings should be commenced to set aside classifications which had already been certified and approved. The Commissioner in transmitting the information contained in Mr. Taff's letter said:

> "There is no such showing in my opinion as would warrant the Department in modifying the practice to the extent of holding, as he appears to desire, that lands may be adjudicated to be mineral lands solely upon the geological formation thereof, and of discoveries and developments of mineral on adjoining lands."

He said Mr. Taff mentioned no specific case as furnishing a substantial reason for such modification of the practice, and he recommended that no action be taken unless a report treating special tracts be submitted.

Notwithstanding that all the applications here involved had been made in good faith, and in absolute keeping with the rules and regulations admitted to exist by Commissioner Richards, the Director of the Geological Survey, and Mr. Taff, the Geologist, the Milner suit was commenced, and the acts of the applicants, which up to that time were in every

respect legal and honest, were to meet geological views of Mr. Taff, declared to be dishonest, and their acts characterized as fraudulent.

DIAMOND COAL CASE.

During the pendency of the Milner action, but in apparent keeping with the suggestions of Mr. Taff, the government brought suit in the District Court for the District of Wyoming against the Diamond Coal & Coke Company, to cancel certain patents on the ground of fraud in securing title under the "Soldiers Additional Homestead Act". This case involved the question of a coal discovery and what was necessary to constitute coal lands. Here the government resorted to the doctrine of "geological inference", and endeavored to establish a new rule as to the proof required to *establish known coal lands*. In this case District Judge Lewis adhered to the established rules and regulations and the proof theretofore for years accepted by the government, and dismissed the bill. The government appealed, and the Circuit Court of Appeals for the Eighth Circuit overruled Judge Lewis (191 Fed. 786) and for the first time United States courts adopted the "geological inference" doctrine, thereby setting aside the rules, regulations and governmental policy which had been in force for nearly thirty years, and under which the Milners and Gilson sought to obtain title to the land in question.

In the Diamond case, however, there was strong evidence of actual fraud by the locaters. This opinion was rendered nearly two years after the Milner case had been submitted. The judgment of the Circuit Court of Appeals was by the Supreme Court affirmed April 6, 1914 (233 U. S. 236).

GOVERNMENT'S POLICY CHANGED.

This was the first decision announcing this doctrine by the Supreme Court of the United States. It overturned the rulings of the Land Department and Federal Courts, under which hundreds of patents had theretofore been granted, and furnished authority for the District Court of Utah to find for the Government in the Milner case. This it did two months after the decision was announced in the Diamond coal case. The defendants then appealed to the Circuit Court of Appeals for the Eighth Circuit, and on February 15, 1915, following the rule announced in the Diamond coal case, the Eighth

Circuit affirmed the decision of the District Court. (228 Fed. 431)

It was the application of this doctrine of "geological inference" which enabled the court to, in effect, hold that the selections made by the Milners and Gilson, and the contracts entered into by them with the State of Utah, (which for more than thirty years had been held lawful, valid and sufficient to warrant them receiving a patent) constituted fraud, and justified the decree in favor of the government, notwithstanding at the commencement of the action its officials admitted that the government did not own the legal title, and that the Government did not seek to deprive the State of the lands involved. The Government, having succeeded in securing a decree that the defendants had no title or right of possession to the lands, and enjoining them from making any claim thereto by virtue of the contracts, the defendants surrendered them to the State for cancellation, and abandoned all claims thereunder. Everything prayed for was accomplished. The contracts having been voided, the defendants were left without any recourse, and nothing further was required by the Government to carry its decision as against these defendants into effect. Thereafter, the defendants asserted no title to and did not enter into the possession of the lands, but "faded out of the picture", leaving the Government to enjoy the fruits of its victory, but with the legal title to the lands still remaining in the State.

It must be admitted that the Government officials on January 7, 1907, when it filed the original complaint, had full knowledge of the facts in relation to the selection of the lands; that application had been made therefor by the State Land Board, and that the same had been regularly certified by the Secretary of the Interior to the State of Utah, and charged against its land grants. It possessed this information when Mr. Maynard, Special Assistant to the Attorney General, appeared before the State Land Board, and stated; "that the State of Utah has purposely not been made a party to this bill. * * * That the only relief asked is that you be relieved of your contracts, and that the legal title to the land is in you now, and if the Government is successful, will be in the State of Utah." When the Government prevailed in the suit and procured its decree on the 8th of June, 1914, quieting title in the lands against the defendants, and that the applications to purchase and the contracts entered into in relation

thereto were fraudulent and void, nevertheless it made no demand upon the State of Utah to surrender up and have cancelled these certifications. For ten years thereafter the Government officials kept faith with the State of Utah, and sacredly observed the promises, statements and representations made by its duly authorized representative in 1907. During all this time the Government knew the State of Utah acquired and held legal and equitable title to these lands. Yet not the slightest question had been raised or suggestion made that the Government claimed any interest in them. No attempt had been made during this long period of time to correct the records, maps or plats maintained by the Government, or to have them show that it still claimed title, either legal or equitable, to these lands. (R. 566)

Utah was charged in its land grant accounts with the land selected. No entry was made changing these charges, or indicating that the State was entitled to lieu lands in the place of those certified.

The Government was chargeable with knowledge of the provisions of Section 8 of the Act of March 3, 1891, fixing the period of limitations within which it had the right to institute proceedings to cancel the certifications if they were wrongfully or fraudulently made. Notwithstanding this knowledge, and that the last certification was December 1, 1903, they were not called in question in the suit filed in 1907, nor were any proceedings instituted following the decree of January 8, 1914. No demand was made upon the State to surrender these certifications. More than six years elapsed after this decree, before the State, the acknowledged legal owner, disposed of these lands. Then, exercising its rights as a sovereign state, entered into a new and independent contract with petitioner and sold the land at $100.00 per acre, or for $556,228.00.

The Land Company and its assignees never, by virtue of the original contracts, acquired any title to the land. They had merely an option and right to purchase, provided they paid, the purchase price. This they failed to do, and automatically their rights ceased. There was then no title, either legal or equitable, in the assignees or the Land Company. The Government having obtained all it sought in its original suit, that is, the concellation of the contracts with the State, no "suit in aid of the former decree" was necessary "to

obtain the benefiits of that decree." The quieting of the title in the Government as against the Land Company could only have been as to such title, interest or claim as the company then had or asserted. Their rights under the original contracts having been terminated, both by their failure to comply with their contracts, and also by the decree of the court, it could not by any stretch of the imagination be legally contended that the quieting of this title in the Government would relate to a title independently acquired more than six years after the decree relied on was rendered.

This new transaction had nothing to do with the attempt made from sixteen to twenty years before to acquire these lands at $1.50 an acre under a contract held void. Stanley B. Milner died in 1906 before the first action was commenced, and Truth A. Milner and Samuel H. Gilson had passed away before the decree was rendered. Only one of the original stockholders of the Land Company was then interested in the corporation, and he held but a few qualifying shares. It was more than four years after this new transaction before the Government, on May 16, 1924, commenced the present action against this petitioner, the Independent Coal & Coke Company, and Carbon County. More than twenty years had then elapsed after the last certification was made, and more than seventeen years after the Government filed its first bill.

PENDING CONTROVERSY.

The present bill alleged the original selections, the contracts of sale by the State to the Milners and Gilson, and the assignment of these contracts to petitioner. It pleaded the action brought in 1907, and the decree rendered therein and affirmed. It then alleged:

> (5) "That plaintiff further shows that the State of Utah was not made a party to said suit, and it was believed by the plaintiff that the State would leave to the determination of the courts the question of the right between the Government and those who had misused the agency of the State in acquiring title to the lands and confirm its subsequent action to that determination.
>
> (6) "However, the State of Utah has not seen fit to so conform its subsequent action to the determin-

ation of the courts, but on the contrary, on February 10, 1920, the State issued its patent to said land to Carbon County Land Company, a corporation, the same party to which said contracts of sale had been assigned. In so doing the State relied upon the fact that it had not parted with the legal title to the lands at the time the decree was entered in the above mentioned suit.

(8) "That said lands have already been determined to be mineral lands, and as such are not subject to selection by the State, both by decision of this court and the Circuit Court of Appeals, and this question is, therefore, res judicata, and that at all times the title to said lands has been equitable in the United States."

Plaintiff prayed that, having conveyed the legal title to the Land Company that the defendants be adjudged to hold whatever title they had in said lands for plaintiff, and to convey the same subject only to the mortgage taken by the State to secure payment of the purchase price, which mortgage, unless the State would surrender its claim, will form the subject of an independent suit between the plaintiff and the State in the Supreme Court of the United States.

Defendants moved to dismiss the action upon the grounds, (a) that the complaint did not state facts sufficient to constitute a cause of action in favor of the plaintiff, and urged that more than six years had intervened between the time said cause accrued before plaintiff commenced the action, and for that reason it was barred by Section 8 of the Act of March 3, 1891. This motion was granted, and on appeal the trial court was reversed. (9 Fed. (2d) 517).

Certiorari being granted by this Court, the decision of the Court of Appeals was affirmed, and the cause remanded with permission to the Government to redraft its bill (274 U. S. 640). On return of the mandate of this Court, the original bill of complaint was amended (R. 1).

UTAH INTERVENERS.

The State of Utah then intervened, pleaded its mortgage, and prayed that its title be quieted as against the United States (R. 36). The United States made unsuccessful objection to this intervention. It then filed its answer to the com-

March 3, 1891, and prayed that the Government be denied the relief asked for in its amended bill, and that the defendant have judgment quieting its title to 4,444.28 acres of land, against all claims, legal or equitable, made by the United States.

DECREE RENDERED.

Upon the trial, the District Court decreed:

(1) That the State of Utah, is as against the United States of America, the owner and entitled to the possession of the lands involved.

(2) That the title of the State of Utah to the lands described be quieted as against all claims of the United States, or any person or persons claiming through or under the United States, and that if the United States of America ever had any claim against the State of Utah for said lands, or to set aside the certifications thereof, that the same was barred prior to the commencement of this action by Section 8 of the Act of Congress, March 3, 1891.

(3) And it is further decreed that the State patent dated February 10, 1920, issued by the State of Utah to the Carbon County Land Company, be and the same is hereby adjudged to be void and of no effect.

(4) That this decree shall not have the effect of adjudicating any rights or liabilities between the State of Utah and the Independent Coal & Coke Company. (R. 97)

APPELLANT CONTENDS.

POINT I.

We insist that the trial court was correct in decreeing the land involved to the State of Utah, and in holding that the Government's action to set aside the certifications thereof was barred by the Act of March 3, 1891.

We contend, however, that the court erred in decreeing that the patent issued by the State of Utah to the Carbon County Land Company was void.

It is evident that the learned District Judge concluded that the decision of the Circuit Court of Appeals for the Eighth Circuit (9 Fed. (2d) 518,) and the opinion of this Honorable Court in the case of Independent Coal & Coke Company v. United States (274 U. S. 640), were controlling in so far as the Carbon County Land Company was concerned. With this view we respectfully disagree. When those decisions were rendered, the only parties before the court were this petitioner, and the Independent Coal & Coke Company (the action was dismissed as against Carbon County by the Court of Appeals). The only question for determination was the correctness of the ruling of the trial court in granting appellee's motion to dismiss the Government's bill on the ground that the suit was barred by the Act of March 3, 1891 (28 Stat. 1095, 9 Fed. (2d) 517).

Circuit Judge Lewis in his opinion held that a certification of land by the Secretary under statutory authority therefor *has the same legal effect as a patent,* but that the suit was not brought to avoid a certification, but was rather an acceptance of the Secretary's certification than an attack upon it; that it was no part or purpose of the suit to vacate or annul the certificate, and therefore the statute relied upon had no application.

The Opinion then assumes that the Land Company must have acquired title to the lands involved solely by *virtue of contracts with the State of Utah,* after the decision holding these contracts void. This erroneous assumption could only have been drawn from the Government's bill, and not from the actual facts as will hereafter be seen. The opinion states (9 Fed. (2d) 518):

> "According to charges in the complaint, the legal title passed through the State to that company *after it was finally decided* that as between appellant (United States) and the Carbon County Land Company, all of the land belonged to the United States, and its title thereto was quieted as against the company. Perforce that decree Carbon County Land Company in accepting a patent from the State obtained nothing but the bare legal title. *On the facts stated,* it acquired no beneficial interest in the lands as against the United States, and the purpose of this suit is to obtain and decree that it holds that title in trust for appellant (United

States) and to compel it to reconvey the legal title to appellant * * *. This suit is in aid of the former decree * * *. *If the case stated in the bill* should be made out it would seem clear that the relief sought should be granted."

We would have no quarrel with the opinion if the facts stated in the bill were true, but as will be fully shown, we respectfully insist they are not, so Judge Lewis cautiously stated: "If the facts stated in the bill should be made out" that then the "relief sought should be granted."

As we have heretofore shown, the original suit was brought solely for the purpose of obtaining a decree cancelling the contracts entered into by the Milners and Gilson with the State of Utah. These contracts were declared void and surrendered for cancellation. The Land Company procured no title or interest by reason of the assigned contracts. This was the relief demanded. This was the construction placed upon the bill and its prayer by the Assistant to the Attorney General who commenced and prosecuted the action. True the decree, contrary to the prayer, quieted the title in the Government as against the defendants, but it could not quiet the title as against the State or any person not a party to that action.

At that time neither the Milners, Gilson nor the Carbon County Land Company had any title to the lands. All they ever had were contracts to purchase that were held void. They never secured any deed or patent by virtue of these contracts. This is now shown by the undisputed testimony. So the Government in the present case did not make out "the case stated in the bill." It is true that more than six years after the decree was rendered declaring the contracts void the Land Company, by reason of a new, independent contract secured the legal title to the lands at $100.00 an acre, but not at $1.50 as provided in the original contract.

The Government having obtained all it sought in the original suit, that is, the cancellation of the contracts with the State, no "suit in aid of the former decree" was necessary to obtain the benefits of that decree. The quieting of the title in the Government as against the Land Company could only have been as to such title, interest or claim as the company then had or asserted.

POINT II.

With due deference to the judgment of this Honorable Court, we feel compelled to dissent from the opinion rendered by Mr. Justice Stone, in Independent Coal & Coke Co. vs. United States, 274 U. S. 640, and particularly from many of the conclusions drawn by him. It will be remembered that three members of this Court did not concur in the majority opinion. There it is stated that:

> "This is a second suit by the United States *and is in aid of the first,* for the restoration of 5500 acres of public lands located in Utah, title to which was procured by fraud perpetrated upon the land officers of the United States."

We earnestly insist that this statement is unwarranted. The Government never by patent, certifications or otherwise passed title to either the Milners, Gilson or the Carbon County Land Company. It did in the usual manner and in accordance with the adopted rules and regulations through its Secretary of the Interior, certify these lands to the State of Utah on and prior to December 10, 1904. In the first suit no attempt was made to set aside these certifications to the State on the grounds of fraud. It is not contended now and never was contended that the State of Utah perpetrated any fraud in the making of these selections. The Government possessed full knowledge of the transaction when it brought suit in 1907, and contented itself with seeking merely to prevent fraud being practiced upon the State of Utah, and not upon it. It sought to set aside contracts made by the State for the sale of these lands at $1.50 an acre, and prevailed. These contracts were cancelled, and this alleged fraud was prevented. The lands were not sold by the State under these contracts. The Government, contrary to the prayer of this bill, did secure a decree quieting its title to the lands as against the Land Company, provided, of course, that company then possessed or thereafter secured title by virtue of these contracts or of the fraud pleaded. The defendants in that action complied with the decree. They neither asked nor secured conveyances from the State under these contracts, and so no aid became necessary to carry into effect the original decree.

Again, it is assumed that when the present suit was filed, that the State and the Land Company had violated the original

decree, and that the patent issued more than six years thereafter was rendered in fulfillment of these void contracts. This conclusion could only have been drawn from the bill, for no answers had been filed, no issues joined, and no proof taken. Beginning with this assumption it is then argued that the Government must have concluded that the State of Utah was not a necessary party, and had no interest in the controversy by reason of the case of Williams vs. United States (138 U. S. 514). In so doing it again had to assume that the State of Utah was in the identical position with the State of Nevada as detailed in the Williams case. Yet such is not the fact as now fully appears from the complaint in intervention filed herein, and from the evidence contained in the record (R. 102 to 593). The opinion then proceeds:

> "Again it is stated that the present suit is founded on the allegations that the State of Utah, not conforming its action to the decision in the first suit, despite the decree and findings of fraud upon which it was based, has conveyed legal title to the fraudulent purchasers. * * * It sets up the equitable title of the interests of the United States in the land *based on the decree in the first suit;* the conveyance by patent of the State's legal interest to the Land Company, and prays that a trust be imposed in favor of the plaintiff, and that defendants be ordered to convey whatever title they had."

Here again it is assumed that the State conveyed the legal title by virtue of the original contracts. This, we respectfully insist, was not true. The opinion then recognizes that the State officials may not have been cognizant of the fraud perpetrated, and that the *legal title of the State was not affected by the decree in the first suit,* and that the United States in an appropriate proceeding might have procured the annulment of the certifications *if it proceeded within the period of limitations.* This is an admission that the legal title was in the State, and is a recognition of the statute of limitations upon which the State and this appellant now relies, and it will not be contended that any attempt was ever made by the Government to set aside this legal title, or cancel these certifications until the Government in the present case filed its answer to the State's complaint in intervention (R. 70-92). Still pursuing the error of assuming that the Land Company's title was the result of the Milner and Gilson contracts, it is

asserted that a legal and valid purchase by the company in a new and independent contract entered into many years after the death of all of the parties charged with fraud,

> "Was a part of the fraudulent conspiracy condemned in the first suit. The decree in the first suit is conclusive that the company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the State and its officials as agencies to procure the transfer." (247 U. S. 646)

To this reasoning we cannot subscribe in the light of the facts in the case. If the Milners and Gilson under their contracts had the right to acquire title to the land upon the fulfillment of contracts which were voided and never fulfilled, then there was neither an equitable or legal title to decree to the Government. In any event it could only be such title as was actually acquired thereunder, and not otherwise. It cannot with reasons be urged that if the sovereign State of Utah held the legal title, and that the time had elapsed in which the Government could rightfully contest this title, that the State could not sell the land and convey good title thereto.

The only question really before this court for determination at that time was whether this action was in effect a suit to cancel the certifications of the Government; and if so, was it barred by the provisions of the Act of March 3, 1891. The court, after indulging in an argument which we feel was not germane to the subject, finally held that it was "not a suit to cancel a certification", and that the statute did not apply. (When the State, however, intervened, and the Government in its answer and counterclaim asked for a cancellation of the certifications, and the State in reply thereto denied the Government's right of cancellation and pleaded the statute of limitations, then it became an issue.) Then though not necessary for a decision of the question before the court the opinion proceeds:

> "We hold that the acquisition of the title of the lands by the Land Company *as set out in the bill,* was in violation of equitable principles, and the decree enjoining the defendants in the first suit from setting up or making any claim to the premises, and that a proper case was stated for the imposition on both petitioners of a constructive trust with respect to the

lands acquired by them. As the bill is not well drafted respondent should have leave to perfect it." (274 U. S. 640)

From the foregoing it is apparent that the court only held that the securing of the title to the land was in violation of "equitable principles and of the decree", and again in effect assumed that the facts were "as set out in the bill".

The bill alleged that the State's contract of sale to the Milners and Gilson was declared void, and then charges that the State, not having conformed its subsequent action to the determination of the courts, but contrary thereto, on February 10, 1920, issued its patent to the Land Company, thereby leaving it open to the conclusion that, notwithstanding the contract had been held invalid, the State nevertheless pursuant to said contracts, issued its patents. This of course was not in accord with the undisputed evidence presented by petitioner and the State of Utah at the trial and as now appears in full in the printed record. (R. 102 to 593)

In the first suit the defendants relied upon the certifications from the Government and the contracts entered into by them with the State. In this case the company bases its claim upon a valid purchase from the State made more than six years after the original decree was rendered and long after the death of all of the individuals charged with having perpetrated a fraud in seeking to purchase from the State the lands at $1.50 an acre.

In the light of the issues finally joined between the Government, the defendants and the intervenor, the State of Utah, we earnestly insist that the opinion delivered by Mr. Justice Stone on behalf of this court is not controlling in this proceeding.

DECISION OF THE CIRCUIT COURT OF APPEALS.

Upon appeal from the decree of the District Court of the State of Utah, the Circuit Court of Appeals (46 Fed. (2d) 980) affirmed the judgment of the trial court declaring that the patent issued by the State to petitioner was void, but reversed that part of the decision holding that the State of Utah was the owner of and entitled to the lands involved. This opinion for the reasons hereafter stated was wrong.

SPECIFICATION OF ERRORS.

Your petitioner assigns and specifies error as follows:

1. The court erred in refusing to set aside that portion of the judgment of the trial court wherein it was decreed that "the State patent dated February 10, 1920, issued by the State of Utah to the Carbon County Land Company, be and the same is hereby adjudged to be void and of no effect," thereby violating the constitutional rights of your petitioner to purchase and acquire the land in question in a lawful, valid and legal transaction.

2. The court erred in refusing to reverse the trial court for failing to decree petitioner the relief prayed for in its answer to plaintiff's amended bill of complaint.

3. The court erred in failing to recognize the legal title to the land involved in the State of Utah, and by so doing sought to vest the Government with authority to control the rights of a sovereign state in its private dealings and transactions with individuals or corporations, and in violation of Article 10 of the Amendments to the Constitution of the United States, which provides that, "the powers not delegated to the United States by the Constitution nor prohibited by the states are reserved to the states respectively or to the people."

4. The court erred in refusing to recognize that the legal title to the lands involved vested in the State of Utah after the issuance of the certifications, the Government admitting at all times that the State held such legal title.

5. The court erred in failing to apply the six year statute of limitations prescribed by Section 8 of the Act of March 3, 1891, in favor of the State of Utah, thereby denying to the State title to the lands involved.

6. The court erred in applying to the conduct of the Milners and Gilson between the years 1901 and 1904, which was in accord with the then existing legal standards another legal standard not created or adopted until 1914, and by this error in effect through a retroactive application of the new standard transformed an honest act into a fraudulent one, and then though the State was not a party thereto, held it responsible therefor.

7. The court erred in holding that the United States is not estopped by reason of the representations of the Special Assistant to the Attorney General who was conducting the Milner suit on behalf of the United States, made for the evident purpose of inducing the State not to intervene in said suit, and to now allow the Government to claim that the State is concluded by the decree entered in the Milner suits, thereby permitting it to reap an unjust advantage from the misconduct of its representatives.

8. The court erred in holding that the State's rights to the land came from, or were held under, the Carbon County Land Company, and in failing to recognize that the State's rights came from the United States under and pursuant to the Enabling Act of July 16, 1894; and erred in concluding that the State of Utah was the successor to your petitioner, and in failing to appreciate that the State was charged by the United States to the full extent of the acreage involved in partial satisfaction of the grant made in the Enabling Act.

9. The court erred in holding that under the peculiar circumstances of this case the State of Utah is bound by the decree entered in 1914 in the case entitled United States v. Milner, et al., supra. (See this petitioner's petition for writ of error, pp. 9 to 12).

10. The court erred in holding that as to the State of Utah the lands involved in this case were known mineral lands, and that there was, therefore, a material misrepresentation of facts as to the character of the land.

11. The court erred in refusing to validate the legal title to the land in the State of Utah, thereby denying the State the right to sell and dispose of said lands, and denying to your petitioner the right to purchase the same in a lawful transaction.

12. The court erred in holding that petitioner was by the decision in the case of United States v. Milner et al., supra, perpetually enjoined from acquiring title to the lands in question in a lawful, valid manner from the legal owner.

ARGUMENT.

I.

The government seeks to base its right of recovery against this appellant by reason of the injunctive relief granted in the original action.

In the 1907 suit the Government only prayed for the cancellation of the contracts entered into by the Milners with the State of Utah, and for general relief. (R. 214-216) There was no prayer for injunctive relief, or any demand to quiet the Government's title in the land as against the defendants. The decree rendered, however, makes no reference to the cancellation of the contract, but decrees that the Government is the owner and entitled to the possession of the land, and enjoins petitioner from making any claim to the premises. (R. 3-4) This decree was unauthorized, and violates the well established principle of pleading and the law applicable thereto. Upon this decree, rendered not in keeping with the issues in that case or the prayer of the bill, the Government now claims that petitioner is perpetually enjoined from acquiring any title to the lands involved. We insist that the decree was void in this respect, and furnishes no authority for the Government's contention.

> "Every decree in a suit in equity must be considered in connection with the pleadings; and if its language is broader than it is required, it will be limited by construction so that its effect shall be such, and such only, as it needed for the purposes of the case that has been made."
>
> Barnes, Trustee v. Chicago M. & P. R. Co., 122 U. S. 1;
> Reynolds et al. v. Stockton, Receiver, 140 U. S. 254;
> Clark v. Arizona Ass'n., 217 Fed. 640;
> Cushman et al. v. Warren Paving Co., 220 Fed. 857.

It is well recognized that the prayer for relief is an essential part of the bill in equity, and relief not affirmatively sought will not be granted. The relief granted must conform

plaint in intervention, and counterclaimed against the State, claiming title to the land, and prayed that the "title of the United States in and to the lands be quieted against all the claims and demands of the State of Utah", and in the alternative, that the selection of said land "so made to the State of Utah at hereinbefore pleaded, and set out be delivered up to be concelled, and that the court by its decree cancel and annul the same". (R. 92) This was the first time that the State ever asked a cancellation of the certifications made by the land office. This counterclaim was filed February 6, 1929, or more than twenty-five years after the last certification was made. A reply to this counterclaim was filed by the State of Utah denying in substance that the Government, at the time of the commencement of the action on May 16, 1924, had any interest whatever, either legal or equitable, in the lands described, or that the lands had been adjudicated to be mineral lands, in any proceedings or action wherein the State of Utah was a party, and denied that on May 9, 1904, or at any time prior thereto, the lands were known to contain coal in commercial quantities. It then pleaded that the cause of action set forth in the counterclaim was barred by virtue of the provisions of Section 8 of the Act of March 3, 1891, which provides that, suits by the United States "to vacate and annul any patent" shall only be brought within six years after the date of the issuance of such patents. The State asked that the United States take nothing by reason of its counterclaim, and that it be dismissed for want of equity, and that the lands described in the complaint be decreed to the State of Utah, and that it be decreed to be the absolute owner of said lands, legal and equitable, as against all claims of the United States. (R. 95-96)

ANSWER OF PETITIONER.

Petitioner in its answer alleged that the extent of the determination made by the decree of 1914, was merely to annul the contracts entered into with the State of Utah and the defendants in that action. It affirmatively alleged that it was not the purpose of the original action to disturb or annul the title of the State of Utah to the land described, but to leave the title vested in the State free from any rights under the contract. It set forth that the State continued to hold said lands free from said contracts, or any rights which might arise therefrom, until February 10, 1920. It alleged that at the time of the certifications and ever since said lands have

been non mineral in character, and have never, as between the United States and the State of Utah, been known or determined to be mineral in character.

> "That while the aforesaid decree finds and adjudicates said lands are mineral in character, and were known to be such at the time of said certification, still said decree could not and did not adjudicate that fact as to the State of Utah, as the State was not a party to said suit and did not in an wise participate in the defense thereof." (R. 48-61)

It was further alleged that the title to said land vested in the State of Utah, and that the State continued to own and possess the land until the title had, by reason of the lapse of time, to-wit, more than six years from the date of the certification, ripened into a perfect title as against the United States, and that while the State was the absolute owner, free from any claims of the Government, the State on February 10, 1920, sold the land to petitioner for one hundred dollars per acre; that the transaction was entirely independent of the transaction involved in the suit decided in 1914; that the purchase from the State was in its capacity as the owner of the land and not as trustee, either actual or constructive, of the United States; that the State issued its patent believing that it was the true and lawful owner thereof, and that the decree rendered in 1914 in no wise interfered with or disturbed either its legal or equitable title.

Defendant pleaded in detail the transaction with the State, the issuance and receipt of the patent; the knowledge of the Government that it had entered into possession of the land in 1920; that it had occupied the possession of the same; leasing a portion to sheep and cattle men for grazing purposes, had caused the land to be placed upon the assessment rolls; that taxes had been assessed upon the property each year, and that it had paid taxes thereon in excess of $15,000.00 prior to the commencement of the action.

It further alleged that in October, 1920, it had sold 1120 acres of the land to the Independent Coal & Coke Company, receiving therefor 369,000 shares of the capital stock of that company, and that that company with the consent of the State had assumed $112,000.00 of petitioner's mortgaged indebtedness. It pleaded that the action was barred by the Act of

to the prayer whereby the party indicates to the court the relief which he demands upon his allegations.

"It is often stated generally as an established doctrine that under the general prayer, relief inconsistent with that asked for by the special prayer cannot be granted."

21 C. J. 683 (Cases cited under note 79);
Hobson v. McArthur, 16 Pet. 182, 10 L. Ed. 934;
Boone et al. v. Chiles et al., 10 Pet. 177, 9 L. Ed. 388;
Hayward v. Elliott Nat'l Bank, 90 U. S. 611, 24 L. Ed. 855;
English v. Foxall, 2 Pet. 595, 7 L. Ed. 531.

Story in discussing the extent to which relief will be granted under the general prayer, states:

"Thus for example an injunction will not ordinarily be granted under a prayer for general relief, but it must be expressly prayed."

Story Eq. Pl. (9 Ed.) Sec. 41, p. 35;
32 C. J. 334, Sec. 552;
Gaines v. Hale, 26 Ark. 168; affirmed 93 U. S. 3;

And it has been held that the rule applies to perpetual, temporary and mandatory injunctions and to restraining orders.

(See cases under Notes 81, 82, 83, 84 and 85, Sec. 552, supra).

Again it is stated in 32 C. J. 278, Sec. 645, that:

"As already shown, the injunction should be confined to the issues raised by the pleadings, and should not be allowed any broader terms than prayed for in the bill, and in any event the restraint imposed by the decree should be no more extensive than is reasonably required to protect the interests of the party in whose favor it was given."

Cincinnati v. Cincinnati Tract Co., 245 U. S. 446;
Hitchman Coal Co. v. Mitchell, 245 U. S. 229;
McNeill v. Southern R. Co., 202 U. S. 543;
(See numerous cases under note 3, Sec. 645, supra).

Again it is stated in the same section, that:

> "The injunction should not be so broad as to prevent defendant from exercising his rights or rights that he may acquire in the future."

New York, N. H. & H. R. Co. v. Interstate Com. Com'n., 200 U. S. 361;
(See cases under notes 4 and 5, Sec. 645, supra).

II.

Appellant's rights are not controlled by the decree of 1914.

This court has definitely recognized the doctrine that a party whose right to land has been adversely adjudicated in a former suit is not precluded in a second suit between the same parties from setting up a newly acquired title.

Barrows v. Kindred, 4 Wall. 399;
Merryman v. Bourne, 9 Wall. 592;
U. S. v. So. Pac. R. Co., 223 U. S. 565.

A decree can be res judicata only as to matters actually decided, or which can be decided in such suit.

Dowell v. Applegate, 152 U. S. 327.

III.

The Statute of Limitations has run in favor of the State of Utah.

Under Section 8 of the Act of March 3, 1891, the Government was limited to six years within which to bring its action against the State for the concellations of the certifications issued. This it failed to do. The last certification issued in 1904. The decree in the original suit was rendered June 8, 1914, and affirmed by the Circuit Court of Appeals November 15, 1915. The case at bar was not brought until May 16, 1924. The Government contends that this action was brought to enforce the judgment and decree affirmed in 1915. The State was not a party to that action, and it is evident that this action was not brought within the six years period. It is a general principle of equity that lapse of time may constitute a sufficient defense in the absence of any statute of

limitations, and without necessary reference to any question of laches.

U. S. v. Beebe et al., 17 Fed. 36;
U. S. v. McElroy et al., 25 Fed. 804.

It was held in United States v. Stinson, (197 U. S. 300), that

> "The Government is subjected to the same rules respecting the burden of proof, the quantity and character of the evidence, the presumption of law and fact, that attended the prosecution of a like action by an individual."

This language has been construed by the Circuit Court of Appeals to be, in effect, and have the same meaning, as the language used in the case of United States v. Detroit T. L. Co., 131 Fed. 668, where Judge Sanford uses the following language:

> "Finally this is a suit in equity. The equitable claims of the United States appeal to the conscience of the chancellor with the same, but no greater or less force, than would those of an individual in like circumstances."

This doctrine was upheld in Shooters Island Shipyard Co. v. Standard Shipbuilding Corporation, (293 Fed. 706), where, on page 715, we find the following:

> "It is well settled that when the United States appeared as a suitor it voluntarily submits to the law, places itself upon the same footing as other litigants, and is not entitled to remedies which cannot be granted individuals." (Citing many cases).

And in United States Libelants v. Norwegian Barke Thekla, (69 L. Ed. 126), Mr. Justice Holmes uses this language:

> "When the United States comes into court to assert a claim, it so far takes the position of a private citizen as to agree by implication that justice may be done with regard to the subject matter."

And it was said by Justice Sanborn in United States v. Hines, (298 Fed. 853):

> "No case has been cited, and we think none can be found, sustaining the proposition that the United States, because of its sovereign character when a litigant in one of the courts, is not bound by the rules enacted for the orderly administration of justice. More than thirty years ago, in United States v. Goodrich, (54 Fed. 21), this court held that its rules were binding upon the United States. The United States, when it enters one of the courts as a litigant, lays aside its power, and to the same extent as other litigants, must conform to rules without the enforcement of which the orderly administration of justice in the courts would be impossible."

The courts having repeatedly held that a patent by the lapse of six years is to have the same effect against the United States that it would have had if it had been valid in the first place, then the situation is the same as if there had been no fraud practiced upon the government, and is as if the patent had been properly, legally and fairly issued. A certification having the same legal effect as a patent, the same doctrine would apply.

U. S. v. Chandler, 209 U. S. 447;
U. S. v. Smith, 181 Fed. 545;
Kansas Lumber Co. v. Moores, 212 Fed. 153;
U. S. v. Whited & Wheeless, 232 Fed. 140;
U. S. v. Winona R. Co., 165 U. S. 467.

A suit to impress a trust and compel a conveyance is a disturbance of the title. A suit which has for its object the disturbance of a title is barred if not begun within the statutory period.

U. S. v. Whited & Wheless, 246 U. S. 552;
U. S. v. Bellingham Bay Imp. Co., 6 Fed. (2d) 102.

If the Act of March 3, 1891, which provides that

> "Suits by the United States * * * to vacate and annul patents hereafter issued shall only be

> brought within six years after the date of the issuance of such patent,"

then the effect of the statute was to make good the title conveyed by the certifications to the State of Utah.

> U. S. v. Chandler-Hunt Dunbar Water Power Co., 209 U .S. 447;
> U. S. v. Whited & Wheless, 246 U. S. 552-563.

Obviously the decree in the first suit against the Carbon County Land Company did not affect the title of the State, as it was not a party to that suit. The Government admits that the legal title was then in the State of Utah. If so, it certainly ripened into a good title by operation of the statute of limitations regardless of the character of the land, or the means by which the State procured title.

> Stockley v. U. S., 260 U. S. 532, 542, 543.

At any time within six years from the date of the certifications issued to the State the United States could have brought suit to annul the certifications and to regain title.

> Burke v. So. Pac. R. Co., 234 U. S. 669, 693.

Not having seen fit to do this, the certifications after the lapse of the statutory period became conclusive. That is the very object of the statute.

> Cramer v. U. S., 261 U. S. 219, 234;
> U. S. v. Winona & St. Peter R. Co., 165 U. S. 463.

In the Winona case, speaking of this statute of limitations, the court said: (p. 476)

> "Under the benign influence of this doctrine it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of title providing only that the land was open to sale and conveyance through the Land Department."

The purpose of the statute of limitations was said by this court in U. S. v. Whited & Wheless, supra, to be to "promote prompt action for annulling patents where calls

therefor was believed to exist, and to make titles resting upon patent dependably secure when the statute of limitations should expire." It was "that patent title might be made secure." (pp. 562, 563)

And in Cramer v. U. S., supra, the court said that the object of the statute was, "to extinguish any right the Government might have in the lands * * *".

It is true the statute does not expressly refer to suits to annul titles other than those conveyed by patent, but titles conveyed by certification are clearly within the purposes of the Act.

U. S. v. Whited & Wheless, supra.

Under the well established practice of the Land Department, lands selected by a state are conveyed to the state not by patent but by certification, and as shown above, such certifications are equivalent to patents.

As this court said in Shaw v. Kellogg, (170 U. S. 312, 351):

> " * * * The significance of a patent is that it is evidence of the transfer of the legal title. There is no magic in the word patent or in the instrument which the word defines. By it the legal title passes, and in whatsoever manner that is accomplished the same result follows as though a formal patent were issued."

It was contended in that case that the ruling in Barden v. So. Pac. R. R. Co. (154 U. S. 288), was not applicable because in the Barden case a patent was involved, but no patent had been issued in the Shaw case. The court expressly rejected that contention.

In U. S. v. Winona & St. Peter R. Co., supra, the United States sued to recover lands which had been certified to the State of Minnesota for the benefit of the railroad company. In considering the equities of the company by reason of the long lapse of time since certification, this court referred to the statute of limitations here involved, and while holding it not applicable because the suit had been brought within the

time prescribed, did say respecting it and another statute (p. 476): "We refer to them as showing the purpose of Congress to uphold titles arising under certification or patent."

Under these authorities we earnestly insist that the Circuit Court of Appeals erred in refusing to apply the statute and to sustain the contention of the State of Utah that it was the owner of the lands and entitled to have its title to them quieted. This error was prejudicial to the rights and the interests of the Carbon County Land Company, for if the State's title was valid then the Land Company had the right in its new independent contract to purchase in a lawful manner the lands in question.

IV.

The court erred in refusing to reverse the Trial Court for failing to find the issues in favor of petitioner under the evidence submitted. And in accordance with the allegations of its answer.

It was alleged and not denied that petitioner purchased the land on January 2, 1920, at $100.00 per acre, and on February 10, 1920, the State executed its patent therefor; that after petitioner entered into possession of the purchased property it sold to the Independent Coal & Coke Company 1120 acres for 369,000 shares of its capital stock, and assumption of $112,000.00 of indebtedness to the State of Utah.

Defendant's Exhibit "B" (R. 263) establishes conclusively that at the time of the filing of the original suit the Government made no claim to these lands. It admitted the legal title was in the State, and that it did not seek to deprive Utah of these lands. It was shown that for more than 17 years this statement was adhered to by the Government. It is fair to assume that when the decree was rendered cancelling these contracts the Government then made no further claim to the lands. If it did, is it not strange that it should allow more than ten years to elapse before instituting any proceedings in relation thereto, and that when it did commence this action it was not for the purpose of divesting the State of its legal title, but for the purpose of having it declared that the Land Company held the equitable title thereto in trust for the Government. Whatever title the Government had, both legal and equitable, was conveyed to the State by the issuance of the certification.

That, petitioner acted in absolute good faith in its dealings with the State of Utah in 1920 is shown by the following testimony.

Clarence E. Milner testified that he was connected with the company in 1920 when it entered into negotiations to purchase the lands; that after the year 1906, and up until 1920, development work had been carried on in coal properties in the vicinity of Kenilworth, Utah, and in view of the new development and the knowledge then possessed they sought to purchase the land from the State, finally agreeing to pay $100.00 per acre therefor; that notes and mortgages were executed and patent received; that the transaction was entered into by the company in good faith, we honestly seeking to acquire title to the land, and have been in possession of it all since receiving patent except 1120 acres sold to the Independent Coal & Coke Company. That the transaction under which the land was purchased in 1920 had no connection whatever with the original contracts. None of the stockholders in the company in 1920 were stockholders at the time of the organization of the company, except Harrison E. Jenkins, who owned twenty shares for qualifying purposes. That the negotiations for the purchase of the land were carried on through their counsel, with the State Land Board of Utah, and the then Attorney General and Governor of the State. (R. 570)

Testimony of like nature was given by Jay S. Milner (R. 572). He was not an incorporator of the company and had nothing to do with the original contract, but was a stockholder in 1920 when the company sought legal advice with reference to who owned the legal title to the land, and particularly as to whether the State of Utah owned such title. That they received an opinion that the title was in the State, and that thereupon negotiations were commenced which resulted in the purchase of the lands and the issuance of patent.

Eli Taylor (R. 559) the Register of the United States Land Office at Salt Lake, testified that the lands in question were all selected by the State and the lists approved as far back as 1904. He detailed the method of preparing these lists, and how the land was selected and approved, and then stated that "Our records still show that the certifications were made to the State of Utah, and show no cancellation."

The testimony given on behalf of petitioner was not denied, and the only evidence offered against appellant was the decree rendered in the original suit on January 8, 1914.

Under this evidence, together with the testimony offered on behalf of the State and the Independent Coal & Coke Company, established petitioner's right to a decree as prayed for.

V.

The rights of the Carbon County Land Company are inseparably connected with the rights of the State of Utah and should be considered in connection therewith.

It is not contended that the State of Utah was guilty of any fraud in the selection of the lands. It acted through its Governor and the Secretary of the State Land Board. The proof submitted by them in the selection of these lands showed that they had investigated the nature and character of the land, and that they were subject to selection under the then existing rules and regulations of the Interior Department and the law as then understood applicable thereto. The lands had been theretofore surveyed and carefully examined by Mr. P. S. Sowers, a government witness, and shown to have been returned as nonmineral land in accordance with the testimony of Mr. J. C. Dick and Edward D. Dunn. When the applications were filed it was shown that the register and receiver certified these lands as nonmineral in character, and were subject to selection under the grants provided for in the Enabling Act. The opinion rendered by the Circuit Court of Appeals states that "We have no disposition to impute to them (the Milners) any moral turpitude, but the fact remains that it has been adjudicated that in a legal sense they fraudulently obtained these lands from the United States." (R. 625) The only way that it was ever found that they were guilty in a legal sense of fraud was that which they did was honest and legal when performed, but by a retroactive interpretation of the law was held to be dishonest and fraudulent. That is, that their acts when performed were honest, but became fraudulent years thereafter by a new interpretation of the rules and regulations of the Land Department and of the decisions which had been in force for a generation. This holding, however, did not involve the State. Its actions in every sense were in keeping with the law, and without any thought of wrong doing.

To now by virtue of the decision in the original Milner case hold that the State was bound by the action of third parties and by a decision in a case to which it was not a party, is a rule to which we cannot subscribe. The State possessed both the legal and equitable title to the land in 1920, and in the exercise of its rights as a state in good faith sold to petitioner the lands. To now have it legally determined that it acquired its title from this petitioner impressed with a constructive trust in favor of the Government is to ignore the plain provisions of the statute and the decisions of this Honorable Court above referred to. The depriving of the State of its title to these lands had the effect of preventing this petitioner from exercising its rights to engage in lawful pursuits and in keeping with its articles of incorporation. This was the effect of the decision of the Circuit Court of Appeals. We cannot believe that it will be upheld by this court.

VI.

Certifications not fraudulent.

The certifications obtained by the State from the Government were not fraudulent because, according to the standard of law existing at the time such certifications were made by the United States to the State, the lands involved were nonmineral in character. It was only by changing the standard existing at the time that they were finally held fraudulent, and then the Government sought to bind the State by a decree in an action in which the State was not a party. The decision of the Circuit Court of Appeals holding that Utah is bound by the decree entered in 1914 is in conflict with the decisions of this Honorable Court and with the general law, for a person cannot be bound in an action to which he was not a party.

Wood v. Davis, 7 Cranch. 271, 3 L. Ed. 339;
Brandon v. Ard, 211 U. S. 11, 53 L. Ed. 68;
Kapiolani Estate v. Atcherley, 238 U. S. 119, 59 L. Ed. 1229;
Tindal v. Wesley, 167 U. S. 204, 42 L. Ed. 137;
Carr v. U. S., 98 U. S. 433, 25 L. Ed. 209;
Cadwallader v. Harris, 76 Ill. 370;
State v. Cincinnati Tin Co., 66 Oh. St. 182, 64 N. E. 68.

To change the rules and the law with reference to the making of land selections after the selections had been made

in accordance with existing law is a policy that ought not to be adopted, and one that has been condemned by Circuit Judge Sanborn in the case of Clancey v. Barker, 131 Fed. 161. In that case at page 171, this language is used:

> "A retroactive decision which makes and applies a new rule of law and attaches another and unforeseen liability to a contract after its execution, is as vicious as an ex post facto statute."

This is exactly what was done in the original Milner suit, and now the Circuit Court of Appeals for the Tenth Circuit has attempted to apply the "constructive trust" theory, and in applying it, to thereby prevent the application of the statute of limitations. This method of reasoning we feel should not be adopted.

CONCLUSION.

The arguments contained in the learned briefs filed by the State of Utah and the Independent Coal & Coke Company in case No. 42, support petitioner's contention to a very large extent in this case, and in so far as their arguments support the position of this petitioner we request that they be considered by the court.

Prior to 1904, if the Government had classified the lands involved as coal lands, the Milners and Gilson could have purchased them from $10.00 to $20.00 per acre according to their distance from a completed railroad. If it is assumed that the tracts were all within the $20.00 limit (which is not true), the total amount they would have had to pay at that price would have amounted to $111,285.00. Yet when the Carbon County Land Company in 1920 purchased them from the State of Utah it contracted to pay the State $556,428.00, or $445,133.00 more than the Government under any circumstances could have received. If, however, the original applicants had filed an application to enter these lands as coal lands their applications, under the rules and regulations then existing, would have been refused by the Land Office as the land was not classified as coal land. If it is admitted that the attempted purchase under the grant to Utah at $1.50 per acre constituted fraud, then the fraud was only the difference in the price charged for agricultural land and that for classified coal land. The Government in 1907 only brought its ac-

tion to prevent the State being defrauded. Under its then contention it succeeded and left the title in the State. Now when the State makes a profitable deal and in keeping with the Government's original announced purpose, it seeks to prevent the State from receiving the benefits of a transaction which means, if petitioner and the Independent Coal & Coke Company shall take the full time provided for in the mortgage, that the State would receive approximately $1,250,000.00 for its public institutions, and in addition thereto there would be paid in County, State and School taxes, based on the present assessed valuation, more than $1,000,000.00. If the Government shall succeed it will now be limited under the leasing law to a low tonnage royalty, and that of a doubtful nature under the general coal industrial situation. And yet it is claimed that petitioner is seeking benefits from an alleged fraudulent contract never completed. This contention we submit is unwarranted.

To refuse to apply the statute of limitations on behalf of the State in this case means that every title secured by state selections and certifications under the land grants will be subject to future contests if, perchance, coal or precious minerals shall hereafter be discovered on them or in close proximity, when some geological theorist employed by the Interior Department insists that under his expert opinion the doctrine of geological inference should apply. Such a situation would render uncertain and insecure and place the title to thousands of acres of land in jeopardy.

To uphold the Government's position would be to abridge the rights of the State of Utah both under the Federal and State constitutions. It would deny its right to legally transfer its property, and at the same time deny to this petitioner its right to purchase, own and possess property legally acquired.

We earnestly insist that the decree of the Circuit Court of Appeals for the Tenth Circuit be reversed.

SAMUEL A. KING,

Attorney for Carbon County Land Company.

PARNELL BLACK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

Nos. 42 and 48.—October Term, 1931.

State of Utah, and Independent Coal & Coke Co., Petitioners, 42 *vs.* The United States of America. Carbon County Land Company, a Corporation, Petitioner, 48 *vs.* The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 15, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

Certiorari was granted in these cases, 283 U. S. 816, to review a decree of the Circuit Court of Appeals for the Tenth Circuit, by which it reversed a decree of the District Court for Utah and adjudged that the United States was entitled to certain lands described in the bill of complaint and that the petitioners' title to the land is impressed with a trust in favor of the United States. It specifically decreed the cancellation of a certain mortgage and of tax liens on the lands claimed by the State of Utah, and directed conveyance of the lands and an accounting for their use by the other petitioners. 46 F. (2d) 980.

The sufficiency of the original bill of complaint was upheld and substantially all the questions now presented were considered and determined by this Court in *Independent Coal & Coke Co.* v. *United States,* 274 U. S. 640. The suit was originally brought against the two corporate petitioners and certain individuals, the state not being a party, and the circumstances, so far as they then appeared, were set out in the opinion of this Court as follows (pp. 642-644):

"This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was

procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances.

"The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (§§ 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See Milner *v.* United States, 228 Fed. 431, 439; United States *v.* Sweet, 245 U. S. 563; Mullan *v.* United States, 118 U. S. 271, 276; § 2318 R. S. The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.

"During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered into agreements with the Commission to purchase lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were non-mineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact. On the faith of these and other documents, the selections were approved by the Secretary of the Interior and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

"In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. . . . the bill . . . sought the quieting of the government's

title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States 'is the owner' and 'entitled to the possession' of the lands in question and that the defendants 'have no right, title or interest, or right of possession,' and perpetually enjoining them 'from setting up or making any claim to or upon said premises.' The Court of Appeals, in affirming the decree, held that 'the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of the lands from the United States.' "

In its first opinion, this Court held, for reasons stated and upon authorities cited, that the decree in the earlier suit conclusively established that the Carbon County Land Company was a party to the fraudulent conspiracy to procure certification of the title to the lands to the state; that as against the Land Company and all claiming under it, the United States was equitably entitled to the land; that the Land Company, so far as it had acquired any interest in the land, was not shielded from the consequence of its fraud by having procured a conveyance to the state, even though the latter was not a party to the fraud; and that the Land Company could not acquire any further interest in the property from the state free of the obligation to make restitution of it, which equity imposes on one who despoils another of his property by fraud. *Independent Coal & Coke Co.* v. *United States, supra,* pp. 647, 648.

As the Independent Coal & Coke Company had acquired its alleged interest in the lands subsequent to their certification by the United States, it was held that it took them subject to the equities of the United States unless the defense of bona fide purchaser was affirmatively established, and "that none of the defendants, nor any claiming under them with notice, could by any legal device, however ingenious, acquire title from the state free from the taint of their fraud." Ibid., p. 646-647.

After the cause had been remanded to the district court, the two corporate petitioners answered, and the state, which had contented itself with filing a brief *amicus curiae* when the cause was first here, was permitted to intervene. By its bill of complaint in intervention the state set up that at the time of the selection and certification of the lands it "believed and had ever since believed that the land so certified by it was agricultural in character and it did not contain any known mineral"; that in 1920, which was subsequent to the decree in the first suit, it had entered

into a new contract with the Land Company, under which it had sold and conveyed the lands to that Company for $100 an acre, or a total of $556,428, taking back a mortgage for that amount, and had since assessed taxes, which were liens upon the lands, aggregating $40,000. The Government, by its answer, prayed the cancellation of the mortgage and tax liens or, in the alternative, if that relief were denied, that the certification of the lands to the state by the United States be cancelled.

After a trial upon evidence, the district court, without making findings, gave judgment cancelling the patent from the state to the Land Company and quieting the state's title. The Court of Appeals, in reversing this decree, made findings, which the evidence supports, that the state, as alleged, had, in 1920, patented the lands to the Carbon County Land Company, taking back a mortgage for the purchase price, and that in the same year the Land Company had sold 1120 acres of the land to the Independent Coal & Coke Company, which had notice of all the proceedings, including the final decree in the first suit.

Upon these findings, it is apparent, from our earlier opinion, that neither of the corporate petitioners can retain any interest in the land, as against the United States. As the Coal Company purchased a part of the lands with notice of the equities of the United States against the Land Company, it took subject to those equities and can be in no better position with respect to them than its grantor. The Land Company, a party to the fraud by which the certification of the lands to the state was procured, and to the decree in the first suit which so determined, could not improve its position by taking any further conveyance from the state. However innocent the state and its officials may have been in this transaction, any interest the Land Company could acquire from the state in its own behalf was but the fruit of its fraud and of its violation of the decree against it. This aspect of the case was discussed and passed upon in our first opinion, pp. 647, 648, 649, and the conclusion there reached requires affirmance of the decree so far as it affects the Land Company and the Coal Company.

The State of Utah can stand in no better situation with respect to the mortgage and tax liens which it asserts. A copy of the bill of complaint in the original suit was handed to the State Board of Land Commissioners when the suit was begun in 1907 and the

state has been fully advised of all the subsequent proceedings. By 1904, it had contracted to sell the lands to Milner and associates for $1.50 an acre, payable in installments of 25 cents a year. By virtue of these contracts, the vendees were equitably entitled to the land, and the state's interest was but that of a vendor, having the mere right to retain the title as security for any unpaid balance of the agreed purchase price. See *Williams* v. *United States,* 138 U. S. 514, 516; *Boone* v. *Chiles,* 10 Pet. 177, 224. It was the equitable ownership in the lands thus acquired by Milner and associates and conveyed by them to the Land Company, which the decree in the first suit, in 1914, adjudged to be in the United States.

The Government's allegation in its answer to the intervention complaint of the state, that at the time of the decree the purchase price had been paid in full, was not denied by the state's replication. No evidence on the point was offered, but in the present circumstances we do not think it material. Subject to the state's security title and right as vendor, every interest in the land was vested in the Land Company, whose rights remained unchallenged and unaffected by any action of the state when the decree was entered in the first suit. That decree irrevocably fastened the equities of the United States upon every right and interest which the Land Company had or could procure in the land. So far as the state was concerned, the decree substituted the United States in the place and stead of the Land Company as equitable owner of the land and stripped the latter of power to surrender its interest to the state. The decree[1] was likewise of binding force upon everyone, including the state, who might later knowingly attempt to acquire any new or different interest in

[1]The decree provided "That the plaintiff [the United States] is the owner and entitled to possession of the following described property, to-wit: * * * and that plaintiff's title thereto be quieted against any and all claims of the defendants, or either of them or of any person or persons claiming, or hereafter to claim through or under the said defendants, or any or either of them; that said defendants, and each of them, have no right, title or interest, or right of possession in or to said premises hereinabove described, or to any part thereof; and the said defendants, and each of them, are perpetually restrained and enjoined from setting up or making any claim to or upon said premises, or any part thereof, and all claims of said defendants, and each of them, are hereby quieted."

the land in derogation of the equities adjudged to be in the United States. Even if we were to assume that at the time of the decree there was an unpaid balance of purchase money (which could not have exceeded $1.50 an acre), the state was entitled only to retain its title until payment was made. Beyond this it could make no profit and derive no benefit free of the equitable rights of the United States. Any grant of the lands by the state to the Land Company or to a stranger, without the assent of the United States, would have been in violation of its equitable rights as they had been adjudicated by the decree. See *Gorham* v. *Farson*, 119 Ill. 425; *Houghwout* v. *Murphy*, 22 N. J. Eq. 531, 546-547; *Taylor* v. *Kelly*, 56 N. C. 240.

Ignoring those rights, the state issued a patent to the Land Company, receiving as the proceeds of its wrongful conveyance, the mortgage of the Land Company, an active participant in the fraudulent scheme, to secure the increased payments of $100 an acre. It actively facilitated the conveyance to the Coal Company by the Land Company, by agreeing with both that the state would release from the mortgage the lands conveyed to the Coal Company upon payment of $112,000, which the Coal Company undertook to pay. This attempted enlargement of the state's interest in the lands, in diminution of the equities of the United States, like the conveyance, mortgage, and agreement by which the attempt was made, was a violation of the decree and of the equitable rights confirmed by it, from which the state can take no benefit. This is not any the less the case because the Land Company, as against the United States, could not rightly receive the patent or retain its benefits or grant to any other than the United States any interest in the patented lands.

The state urges that the United States is estopped to assert any claim to the lands as against it by statements made by a Special Assistant Attorney General in a conversation between him and members of the Board of Land Commissioners in 1907, when he delivered to them a copy of the bill of complaint in the first suit. We agree with the court below that his statements cannot be regarded as so inconsistent with the bill as to form any basis for the alleged estoppel. In any case, he was obviously without authority to dispose of the rights of the United States in its mineral lands and could not estop it from asserting rights which he could not

surrender. *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 408, 409; see also *San Pedro and Cañon del Agua Co.* v. *United States,* 146 U. S. 120, 131 et seq.

It is also argued that the lands were not mineral lands, and that the adjudication to that effect in the first suit is not *res adjudicata* as to the state. That question was again litigated in the present suit, and upon this issue the court below, upon sufficient evidence, found in favor of the United States. See *Diamond Coal & Coke Co.* v. *United States,* 233 U. S. 236. But we do not think that question requires our examination or is open upon the present record. The decree in the first suit adjudicated the equitable rights of the United States as against the corporate petitioners. For reasons already stated, the state has at no time had or asserted any interest superior to that of the United States, except its vendor's title, which it has since relinquished to the Land Company.

In our first opinion we held that the six year statute of limitation of actions to cancel patents granted by the United States, even if embracing a suit brought for cancellation of a certification of lands by the United States, had no application to the relief sought against the corporate petitioners. For the same reason it can have none to the relief granted against the state in accordance with the prayer of the bill. The present suit did not seek cancellation of the certification unless that prayer was denied. It asserts equitable rights to interests in the land derived under and by virtue of the certification. The decree proceeds, and is affirmed here, on the ground that the mortgage and tax liens asserted by the state are subordinate to those rights.

We have considered, but find it unnecessary to discuss, other objections to the decree.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.